

WHAT A FEMINIST INTERNATIONAL LABOR STANDARD CAN TEACH THE U.S. ABOUT ADDRESSING SEXUAL HARASSMENT IN THE WORKPLACE

*Robin R. Runge**

I. INTRODUCTION

In June 2019, the International Labor Organization adopted Convention 190 and Recommendation 206 concerning the elimination of violence and harassment in the world of work, including gender-based violence and harassment.¹ International Labor Convention 190 is the first binding international labor standard to comprehensively address these abuses in the workplace.² The Convention and the Recommendation take a feminist and gender-responsive approach, recognizing that women and other workers experiencing multiple forms of exclusion and discrimination are facing the highest rates of violence and harassment and need to be centered in the employer policies and national laws drafted to eliminate it.³ The Convention provides a clear, intersectional framework for preventing and addressing gender-based violence and harassment, describing the roles and responsibilities of governments, employers, and workers' organizations (unions) to ensure the right of all workers to be free from violence and harassment.

The successful adoption of Convention 190 and Recommendation 206 by the tri-partite members of the International Labor Organization—including government, employer, and worker representatives—came about through a multi-year advocacy campaign led by women union activists and feminist and human rights allies to end gender-based violence in the

* Associate Professorial Lecturer in Law, The George Washington University Law School. Thank you to COSELL for the opportunity to present a draft of this paper and receive invaluable feedback from participants, and the law students at the University of Louisville Law Review Symposium for their invaluable feedback.

¹ Eliminating Violence and Harassment in the World of Work: ILO Convention No. 190, Recommendation No. 206, and Accompanying Resolution, INT'L LABOUR ORG. 1 (June 21, 2019), https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_721160.pdf [<https://perma.cc/CD76-M4UG>] [hereinafter ILO Convention No. 190].

² *Id.*

³ *Id.* at 3–4.

workplace.⁴ It was preceded and bolstered by the #MeToo movement when it relaunched in 2017. The U.S. voted in support of it.⁵

Women workers from diverse sectors and countries made up the majority of workers group representatives during negotiations of the instrument at the International Labor Conference in 2018 and 2019.⁶ Due in large part to their advocacy, the Convention and supplemental Recommendation contain an approach to preventing and addressing gender-based violence and harassment in the world of work that is inclusive and intersectional. This is reflected in its broad definition of violence and harassment, including gender-based violence and harassment that addresses both individual and structural abuses, the expansive coverage of workers regardless of contractual status and broad application to the world of work, and its requirement for governments to implement gender-responsive structural change with a focus on prevention.⁷ Finally, the instruments expressly state that the root causes of violence and harassment, including gender-based violence and harassment, must be addressed in order for states, employers, and worker organizations to meet their obligations, with a particular acknowledgment of the need to address risk factors in workplaces.⁸

In spite of ongoing efforts to improve legal and policy frameworks to prevent and address sexual harassment in the U.S. workplace, it remains an epidemic, destroying lives and careers and limiting the economic contributions and opportunities of hundreds of thousands of workers and their employers. This Article explains how existing policies and practices continue to perpetuate risk factors, including structural intersectional inequality, for gender-based violence and harassment in the workplace to persist. It argues that implementation of the approach and framework contained in these international instruments will more effectively prevent and address gender-based violence and harassment in the world of work by providing critical guidance to policymakers, employers, and unions in the United States.

⁴ See *End Gender-Based Violence in the World of Work*, CTR. FOR WOMEN'S GLOB. LEADERSHIP, <https://16dayscampaign.org/campaigns/iloendgbv/> [<https://perma.cc/JT9N-LFET>] (last visited Apr. 8, 2021).

⁵ *Final Record Vote on the Adoption of the Convention Concerning the Elimination of Violence and Harassment in the World of Work*, INT'L LABOUR ORG. 2 (June 21, 2019), https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_711349.pdf [<https://perma.cc/DLU4-JAME>].

⁶ See Robin Runge, *Can a Global Treaty End Gender-based Violence at Work? With Workers it Will*, THOMSON REUTERS FOUND. NEWS (June 10, 2019, 14:45 GMT), <https://news.trust.org/item/20190610141750-pfm84/> [<https://perma.cc/WH8J-2KDH>].

⁷ ILO Convention No. 190, *supra* note 1, at 5–6.

⁸ *Id.* at 4, 16, 17, 20–21.

II. INTRODUCTION/BACKGROUND

Gender-based violence and harassment (GBVH) is a global problem affecting tens of millions of women by causing economic, emotional, and physical harm and undermining economic security.⁹ Approximately one in three women worldwide have experienced either physical or sexual violence in their lifetime.¹⁰ It is an abuse of power reinforcing inequalities between women and men, one of the most prevalent and yet hidden human rights violations, and a primary barrier to achieving gender equality.¹¹ It silences those who are targeted and creates an environment of intimidation and fear.¹² GBVH is used to legitimize gender inequalities and unequal power relations between men and women and intersecting forms of oppression.¹³ Rooted in discriminatory gender norms and laws and buttressed by impunity, GBVH occurs in all societies as a means of control, subjugation, and exploitation that further reinforces gender inequality.¹⁴ It is also costly for employers and undermines national economic growth.¹⁵

The prevalence of forms of GBVH at work around the world is well-documented: In Cambodia, a 2017 study of garment workers reported that nearly one in three women experience sexual harassment at work.¹⁶ In Uganda, a survey indicated that ninety percent of women had been sexually harassed at work by their male superiors.¹⁷ In Ecuador's export-oriented

⁹ See *Violence Against Women*, WORLD HEALTH ORG. (Mar. 9, 2021), <https://www.who.int/news-room/fact-sheets/detail/violence-against-women#:~:text=Global%20estimates%20published%20by%20WHO,viole%20is%20intimate%20partner%20violence> [https://perma.cc/DMZ3-M5TZ]; see also *Facts and Figures*, PEACEWOMEN, https://www.peacewomen.org/assets/image/Resources/facts_and_figuresrev1.pdf [https://perma.cc/V4L L-EMH2] [hereinafter PEACEWOMEN].

¹⁰ PEACEWOMEN, *supra* note 9.

¹¹ See STEPHEN GLENN ET AL., INT'L TRADE UNION CONFEDERATION, *GENDER (IN)EQUALITY IN THE LABOUR MARKET: AN OVERVIEW OF GLOBAL TRENDS AND DEVELOPMENTS* 42 (Mar. 2009), https://www.ituc-csi.org/IMG/pdf/GAP-09_EN.pdf [https://perma.cc/NJA7-MV25]; Adrienne Cruz & Sabine Klinger, *Gender-Based Violence in the World of Work: Overview and Selected Annotated Bibliography* 1 (Int'l. Labour Office, Working Paper No. 3, 2011), https://www.ilo.org/wcmsp5/groups/public/---dgreports/---gender/documents/publication/wcms_155763.pdf [https://perma.cc/52B3-Q29N].

¹² See GLENN ET AL., *supra* note 11, at 17, 45.

¹³ See *id.* at 9, 21.

¹⁴ See *id.* at 1.

¹⁵ See Shiu-Yik Au et al., *Employee Sexual Harassment Reviews and Firm Value* (Feb. 10, 2021) (unpublished manuscript) (available electronically) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3437444 [https://perma.cc/YC2K-CHZF]; ELYSE SHAW ET AL., INST. FOR WOMEN'S POLICY RESEARCH, *SEXUAL HARASSMENT AND ASSAULT AT WORK: UNDERSTANDING THE COSTS* (Oct. 2018), https://iwpr.org/wp-content/uploads/2020/09/IWPR-sexual-harassment-brief_FINAL.pdf [https://perma.cc/QB8T-BXS8].

¹⁶ SABINA LAWRENIUK & LAURIE PARSONS, CARE INT'L, 'I KNOW I CANNOT QUIT.' THE PREVALENCE AND PRODUCTIVITY COST OF SEXUAL HARASSMENT TO THE CAMBODIAN GARMENT INDUSTRY (Mar. 2017), https://www.care.org.au/wp-content/uploads/2017/04/SHCS_Full_Technical_Report_March_2017.pdf [https://perma.cc/Y3XJ-G584].

¹⁷ INT'L TRADE UNION CONFEDERATION, *NO MORE WORDS – IT'S TIME FOR ACTION* (2014),

flower production industry, over fifty-five percent of flower workers have suffered some form of sexual harassment; with younger workers aged twenty to twenty-four the figure was as high as seventy percent.¹⁸ In Swaziland, where women make up ninety percent of the garment sector, a 2014 survey of more than four hundred garment workers noted that more than seventy percent of respondents reported witnessing verbal and physical abuse in their workplace by supervisors.¹⁹ In a recent study in Morocco, 24.3% of female employees reported having been sexually assaulted, while 13.4% said they were victims of digital gendered violence.²⁰ In a study of commercial agriculture workers in Kenya, ninety percent had experienced or observed sexual abuse at their workplace.²¹ A survey by the Association of Tunisian Women for Research and Development (AFTURD) on full-time domestic workers shows that 14.2% of respondents claim to have been victims of sexual abuse at the hand of their employers, and 16.2% of young women say they were forced into sexual touching and 18.2% into forced sexual intercourse.²² In a Bangladesh study of garment workers, eighty percent reported that they had experienced some form of violence and harassment in the world of work.²³ Global institutions also have not been immune, with one in three UN workers reporting that they had been sexually harassed in the past two years.²⁴

https://www.ituc-csi.org/IMG/pdf/iwd_2014_final.pdf [<https://perma.cc/HQX3-MCW9>].

¹⁸ NORMA MENA & SILVIA PROAÑO, INT'L LABOR RIGHTS FUND, *SEXUAL HARASSMENT IN THE WORKPLACE: THE CUT FLOWER INDUSTRY* (Apr. 2005), https://ecommons.cornell.edu/bitstream/handle/1813/99627/1/LRF_SexualHarassment_Ecuador.pdf?sequence=1&isAllowed=y [<https://perma.cc/DX6N-MLT2>].

¹⁹ Tula Connell, *Survey Reveals Abuse of Textile Workers in Swaziland*, SOLIDARITY CTR. (Jul. 30, 2014), <https://www.solidaritycenter.org/survey-reveals-abuse-of-textile-workers-in-swaziland/> [<https://perma.cc/78ND-CYYU>].

²⁰ Tamba François Koundouno, *Over 90% of Morocco's Sexual Assault Victims Do Not Report Their Experiences*, MOROCCO WORLD NEWS (July 10, 2019), <https://www.morocoworldnews.com/2019/07/277762/90-MOROCCO-SEXUAL-ASSAULT-REPORT-EXPERIENCES/AMP/> [<https://perma.cc/48DQ-F3PS>].

²¹ Carla Henry & Jacqueline Adams, *Spotlight on Sexual Violence and Harassment in Commercial Agriculture: Lower and Middle Income Countries 7* (Int'l Labour Office, Working Paper No. 31, 2018), https://www.ilo.org/wcmsp5/groups/public/---dgreports/---inst/documents/publication/wcms_630672.pdf [<https://perma.cc/P7XT-QGTR>].

²² *Travail Informel En Tunisie*, FORUM TUNISIEN POUR LES DROITS ECONOMIQUES ET SOCIAUX (May 23, 2014), https://ftdes.net/travail-informel-en-tunisie-un-facteur-a-inclure-dans-les-strategies-de-lutte-contre-les-violences-basees-sur-le-genre_trashed/ [<https://perma.cc/M9YN-2DQL>] (citing the 2008-2009 survey by the Association of Tunisian Women for Research and Development).

²³ ACTIONAID, *SEXUAL HARASSMENT AND VIOLENCE AGAINST GARMENT WORKERS IN BANGLADESH* (2019), <https://actionaid.org/sites/default/files/publications/ActionAid%20briefing%20paper%20on%20Bangladesh%20garment%20workers%20FINAL.pdf> [<https://perma.cc/24JL-BP7B>].

²⁴ See Amy Lieberman, *The UN Pledged to Tackle Sexual Harassment. The Work Remains Incomplete, Experts Say*, DEVEX (Feb. 11, 2021), https://www.devex.com/news/the-un-pledged-to-tackle-sexual-harassment-the-work-remains-incomplete-experts-say-98850?access_key=&utm_source=newsletter&utm_medium=newswire&utm_campaign=top&utm_content=title&mkt_tok=eyJpIjoTkRC

In the United States, two-thirds of women workers and over half of men workers in the restaurant industry who responded to a survey in 2014 stated that they had experienced some form of sexual harassment from management,²⁵ and nearly eighty percent of women and fifty-five percent of men experienced some form of sexual harassment from customers.²⁶ A 2016 study on workplace harassment in the fast food industry found that thirty-three percent of Black women and thirty-two percent of Latinas experience sexual harassment compared to twenty-five percent of white women.²⁷ A survey of nearly five hundred women conducted by Unite Here Local found that fifty-eight percent of hotel workers and seventy-seven percent of casino workers surveyed in Chicago have been sexually harassed by a guest, including incidents like a guest answering the door naked or exposing themselves.²⁸ Similarly high rates of sexual harassment, including rape and other sexual violence, have been reported by farmworker women, female construction workers and food processing workers in the U.S.²⁹ GBVH is not limited to low wage occupations.³⁰ It is prevalent in male-dominated occupations where occupational segregation is understood as a risk factor.³¹ A survey of three thousand businesses and law firms conducted in July 2018 found that sixty-eight percent of female respondents had experienced sexual harassment.³² A 2020 survey of technology employees, founders, and

bU5UWmpaV114TnpKbSIsInQiOieJZGJ1XC94WVFHN21US0ImN0pMV2RZUkJhT0JLQzVZMEF1REt6WEZuSmVirjNyMW1PaUtjNGpjcfMzQ2I4UENoZ1VNT2JDa2ZVemIoVGNTSm5uUnUwaTIt aGtXUnJhWlJSV1ZYbUZQOVNS1BTZVpYbXh3VXU5dVwvUVocTRQNIITIn0%3D [https://perma.cc/MT6D-APNV].

²⁵ THE RESTAURANT OPPORTUNITIES CENTERS UNITED FORWARD TOGETHER, THE GLASS FLOOR: SEXUAL HARASSMENT IN THE RESTAURANT INDUSTRY (Oct. 7, 2014), https://chapters.rocnited.org/wp-content/uploads/2014/10/REPORT_The-Glass-Floor-Sexual-Harassment-in-the-Restaurant-Industry2.pdf [https://perma.cc/QMM7-5M3X] (noting that women experienced higher rates of sexual harassment than men overall, that workers in tipped jobs experienced higher rates of sexual harassment than those in non-tipped jobs, and workers in states where the sub-minimum wage is \$2.13/hour experienced higher rates than workers in states where the sub-minimum wage was higher).

²⁶ *Id.*

²⁷ Memorandum from Hart Research Serv. to Interested Parties, HART RES. (Oct. 5, 2016), <https://hartresearch.com/wp-content/uploads/2016/10/Fast-Food-Worker-Survey-Memo-10-5-16.pdf> [https://perma.cc/D7WS-GH69].

²⁸ See UNITE HERE LOCAL, HANDS OFF PANTS ON: SEXUAL HARASSMENT IN CHICAGO'S HOSPITALITY INDUSTRY 1 (2016), <https://www.handsoffpantson.org/wp-content/uploads/HandsOffReportWeb.pdf> [https://perma.cc/3TMZ-YFR9].

²⁹ See ROBIN RUNGE, AFL-CIO, ENDING GENDER-BASED VIOLENCE IN THE WORLD OF WORK IN THE UNITED STATES 6–7 (2017), <https://aflcio.org/sites/default/files/2017-04/Ending%20Gender%20Based%20Violence%20in%20the%20World%20of%20Work%20USA%20Report%20%28002%29.pdf> [https://perma.cc/8DSQ-X89Q] [hereinafter RUNGE, ENDING GENDER-BASED VIOLENCE].

³⁰ *See id.* at 3.

³¹ *See id.* at 4, 7.

³² Hannah Hays, *Is Time Really Up for Sexual Harassment in the Workplace? Companies and Law Firms Respond*, AM. B. ASS'N (Jan. 17, 2019), <https://www.americanbar.org/groups/diversity/women/publications/perspectives/2018/december-january/is-time-really-for-sexual-harassment-the-workplace-companies-and-law-firms-respond/> [https://perma.cc/N9YH-DSTK].

investors found that of the forty-four percent of women founders who said they were harassed, forty-one percent stated that they experienced sexual harassment, including being propositioned for sex, being groped, or being sent graphic photos.³³

Although women experience the majority of GBVH in the workplace, LGBTQ+ workers also experience high rates of sexual harassment at work.³⁴ For example, research conducted by the Trades Union Congress in the United Kingdom in May 2019 found that nearly seven in ten LGBTQ+ people have been sexually harassed at work.³⁵ Twenty-one percent of female LGBTQ+ workers reported that they experience sexual assault and twelve percent of LGBTQ+ women said that they had been seriously sexually assaulted or raped at work.³⁶ Moreover, studies have found that Black women and other women of color experience much higher rates of sexual harassment.³⁷ Finally, documented and undocumented immigrants are at very high risk for GBVH at work, especially as farmworkers, cleaners, and meatpackers.³⁸

Examples of GBVH include garment workers in Cambodia who report being forced to be a mistress of a supervisor or manager—meaning having to have sex whenever asked—in order to improve their working conditions,³⁹ as well as sexual harassment of women on public transportation commuting to and from work in Nigeria.⁴⁰ In the U.S., GBVH in the construction

³³ *The State of Women in Tech and Startups*, WOMEN WHO TECH (2020), <https://womenwhotech.com/data-and-resources/state-women-tech-and-startups> [<https://perma.cc/5SVV-W238>].

³⁴ See Report, Sexual Harassment of LGBT People in the Workplace, TRADES UNION CONGRESS 5 (Apr. 2019), https://www.tuc.org.uk/sites/default/files/LGBT_Sexual_Harassment_Report_0.pdf [<https://perma.cc/MM6H-Z88Y>].

³⁵ *Id.*

³⁶ *Id.* See also, JAIME M. GRANT ET AL., INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY 51 (2011), https://www.transequality.org/sites/default/files/docs/resources/NTDS_Report.pdf [<https://perma.cc/NWT4-MUWW>] (reporting that ninety percent of transgender or gender nonbinary people surveyed had experienced harassment, mistreatment, or discrimination on the job or had taken actions to avoid this treatment).

³⁷ See Dan Cassino & Yasemin Besen-Cassino, *Race, Threat and Workplace Sexual Harassment: The Dynamics of Harassment in the United States, 1997-2016*, 26 GENDER, WORK & ORG. 1221, 1223 (2019), <https://onlinelibrary.wiley.com/doi/epdf/10.1111/gwao.12394> [<https://perma.cc/98UW-BNVT>]; Kathleen M. Rospenda et al., *Prevalence and Mental Health Correlates of Harassment and Discrimination in the Workplace: Results from a National Study*, 24 J. INTERPERSONAL VIOLENCE 819 (May 2009) (finding that African American women experience the highest levels of harassment and discrimination in the workplace); BULLYING AND HARASSMENT IN THE WORKPLACE (Ståle Valvatne Einarsen et al. eds., CRC Press 2d ed. 2010).

³⁸ BERNICE YEUNG, IN A DAY'S WORK: THE FIGHT TO END SEXUAL VIOLENCE AGAINST AMERICA'S MOST VULNERABLE WORKERS 6–7, 36, 41, (2018).

³⁹ SOLIDARITY CTR., IN OUR OWN WORDS: WOMEN WORKERS ADDRESS GENDER-BASED VIOLENCE IN GARMENT FACTORIES IN CAMBODIA 3 (2019), <https://www.solidaritycenter.org/wp-content/uploads/2019/06/Gender.Cambodia-report.6.19.pdf> [<https://perma.cc/G336-CPM8>].

⁴⁰ See CASSANDRA WATERS & ROBIN RUNGE, SOLIDARITY CTR., MADE FOR THIS MOMENT: HOW ILO CONVENTION 190 ADDRESSES GENDER-BASED VIOLENCE AND HARASSMENT IN THE WORLD OF WORK DURING THE COVID-19 PANDEMIC AND BEYOND 7 (2020), <https://www.solidaritycenter.org/wp-content/uploads/2021/02/Gender.Publications.Made-for-this-Moment.12.20.pdf> [<https://perma.cc/SEH7->

industry, where women make up approximately three percent of the sector, includes women being given jobs that are the most dangerous, or men refusing to assist women workers hoping that they will fail or quit, in addition to men repeatedly grabbing the buttocks and shoving themselves up against women co-workers.⁴¹ In these ways, GBVH discourages women from entering fields where they anticipate they will experience it and it causes women to leave fields where they do experience it, perpetuating occupational segregation and the pay gap which are risk factors for GBVH.⁴²

Importantly, GBVH in the workplace includes the impact of domestic violence on the workplace. Studies done in the U.S. indicate that twenty-one percent of employees identify as survivors of intimate partner violence that impacts their ability to maintain their employment.⁴³ Moreover, offenders are also employees, who use workplace resources to stalk or otherwise abuse their victims.⁴⁴ Similar studies conducted by the Canadian Labour Congress⁴⁵ and the International Trade Union Confederation in Mongolia,⁴⁶ the

KNX7].

⁴¹ Caroline Preston, 'You Don't Say Things': *The Jobs Where Sexual Harassment and Discrimination Never Stopped*, USA TODAY, <https://www.usatoday.com/story/news/education/2021/01/31/women-push-curb-sexual-harassment-trade-job-apprenticeships/4309434001/> [<https://perma.cc/56M3-TXL8>] (last updated Feb. 1, 2021, 9:26 PM) (reporting on the harassment and threats of violence experienced by women construction workers in apprenticeship programs and construction jobs even after #MeToo).

⁴² *See id.*

⁴³ Roy Maurer, *When Domestic Violence Comes to Work*, SHRM, <https://www.shrm.org/resourcesandtools/hr-topics/risk-management/pages/domestic-violence-workplace-nfl-ray-rice.aspx> [<https://perma.cc/25MJ-ARH8>] (last visited Apr. 17, 2021).

⁴⁴ *Id.*

⁴⁵ CANADIAN LABOUR CONGRESS, CAN WORK BE SAFE, WHEN HOME ISN'T?: INITIAL FINDINGS OF A PAN-CANADIAN SURVEY ON DOMESTIC VIOLENCE AND THE WORKPLACE 5-6 (2014), https://canadianlabour.wpengine.com/wp-content/uploads/2019/04/dvwork_survey_report_2014_enr.pdf [<https://perma.cc/HHS9-YW2X>] (survey of 8,429 people in Canada finding 33.6% reported experiencing domestic violence, 35.4% of respondents reported having at least one co-worker who they believe is experiencing or has previously experienced domestic violence and 11.8% reported having at least one co-worker who they believe is being abusive; of those exposed to domestic violence 38% reported it affected their ability to get to work, and 8.5% stated they had lost a job due to domestic violence).

⁴⁶ *See* INT'L TRADE UNION CONFEDERATION-ASIA PACIFIC, NATIONAL SURVEY RESULTS ON THE IMPACT OF DOMESTIC VIOLENCE ON WORKERS AND WORKPLACES IN MONGOLIA 5-6 (2017), <https://www.ituc-csi.org/IMG/pdf/dvatwork-mongolian-surveyresults.pdf> [<https://perma.cc/T2EA-KKLL>] (finding fourteen percent of respondents reported experiencing domestic violence in their lifetime; twelve percent indicated that they knew someone at work who had; of those who reported experiencing domestic violence thirty-seven percent stated that it impacted their ability to work, including making them late or absent from work).

Philippines,⁴⁷ and Taiwan⁴⁸ demonstrate the impact of domestic violence on workers and the workplace. Several states in the U.S. and New Zealand have adopted legislation recognizing the obligations of employers not to discriminate or retaliate against employees who are survivors of domestic violence, and to affirmatively provide paid and unpaid leave from work to address the impact of victimization on their lives without the fear of job loss, which is a risk factor for continuing abuse.⁴⁹ Legislation has been pending on the federal level in the U.S. since 1997 to prevent and address the impact of domestic violence in the workplace, and many employers have adopted policies pursuant to a 2012 Presidential Memorandum.⁵⁰

A. *Preventing and Addressing Sexual Harassment in the Workplace in the U.S.*

With the prevalence of sexual harassment in U.S. workplaces, there are ongoing efforts to prevent and address it, including grassroots advocacy to increase awareness of the scope and impact of sexual violence on individuals, workplaces, and communities.⁵¹ This work is exemplified by the #MeToo

⁴⁷ See INT'L TRADE UNION CONFEDERATION-ASIA PACIFIC, PHILIPPINES: DOMESTIC VIOLENCE AT HOME AFFECTS WORK AND WORKPLACES! (2015), https://www.ituc-csi.org/IMG/pdf/philippine_domestic_violence_survey_key_findings_23_september_2015.pdf [<https://perma.cc/8TQH-UQHU>] (finding seventy-five percent reported that domestic violence affected their work performance, thirty-four percent of those who experienced domestic violence reported that their abuser was employed at the same workplace, nearly seventy-four percent of respondents who reported knowing someone at work who had experienced domestic violence and that it impacted them too, and ten percent of respondents indicated they lost their job as a result of domestic violence and twenty-one percent reported experiencing discrimination from their employer as a result of discussing their victimization).

⁴⁸ See INT'L TRADE UNION CONFEDERATION-ASIA PACIFIC, NATIONAL SURVEY RESULTS ON THE IMPACT OF DOMESTIC VIOLENCE ON WORK, WORKERS AND WORKPLACES IN TAIWAN 5-7 (2017), <https://www.ituc-csi.org/IMG/pdf/dvatwork-taiwanese-surveyresults.pdf> [<https://perma.cc/GSJ4-JXGZ>] (finding thirteen percent of respondents reported experiencing domestic violence, sixty-seven percent of whom indicated that it affected their ability to work; forty-four percent stated that domestic violence made them late to work and many received abusive text and phone calls at work).

⁴⁹ See Maurer, *supra* note 43; Merrit Kennedy, *New Zealand Will Provide Paid Leave to Domestic Violence Survivors*, NPR (July 26, 2018, 1:12 PM), <https://www.npr.org/2018/07/26/632601325/new-zealand-will-provide-paid-leave-to-domestic-violence-survivors> [<https://perma.cc/SE7V-UKBN>].

⁵⁰ See Memorandum Establishing Policies for Addressing Domestic Violence in the Federal Workforce, DAILY COMP. PRES. DOC. (Apr. 18, 2012), <https://www.govinfo.gov/content/pkg/DCPD-201200281/pdf/DCPD-201200281.pdf> [<https://perma.cc/ND98-DFH6>]; U.S. OFFICE OF PERS. MGMT., GUIDANCE FOR AGENCY-SPECIFIC DOMESTIC VIOLENCE, SEXUAL ASSAULT, AND STALKING POLICIES 3 (2013), <https://www.opm.gov/policy-data-oversight/worklife/reference-materials/guidance-for-agency-specific-dvsas-policies/> [<https://perma.cc/K8HW-6RGT>]; U.S. GEN. SERV. ADMIN., 9700.5 CPO (Extended), GSA POLICY AND PROCEDURE FOR ADDRESSING DOMESTIC VIOLENCE, SEXUAL ASSAULT AND STALKING IN THE WORKPLACE (2013), <https://www.gsa.gov/directive/gsa-policy-and-procedure-for-addressing-domestic-violence,-sexual-assault-and-stalking-in-the-workplace> [<https://perma.cc/UJV6-CFBU>].

⁵¹ See generally, Michael Goerlitz, *Women Activists Stress Importance of Grassroots Movements to Combat Sexual Violence*, DAILY PENNSYLVANIAN (Mar. 19, 2019, 12:15 AM), <https://www.thedp.com/article/2019/03/women-activists-me-too-grassroots-movement-penn-womens->

movement, begun by Tarana Burke more than ten years ago to respond to the needs of survivors of these abuses in the workplace and elsewhere.⁵² More recently, there has been a wave of advocacy and legal analysis of existing interventions and calls for reform.⁵³ Advocacy efforts have attempted to address why sexual harassment persists, even when there have been federal and state laws prohibiting it and training programs provided by employers for more than a half a century.⁵⁴ There have also been efforts to bring an intersectional perspective to reform efforts to ensure that the experiences and voices of low wage workers, Black workers, Latinx workers, and immigrant workers are leading this work.⁵⁵ This advocacy has focused on prevention through changing the culture in workplaces, on improving education and training in workplaces on what sexual harassment is and what to do when you think you see or experience it, creating avenues for workers to come forward with concerns or questions confidentially, and increasing transparency about the number of complaints filed and resolutions reached.⁵⁶

In 2015, the U.S. Equal Employment Opportunity Commission (EEOC), the federal agency charged with enforcing Title VII of the Civil Rights Act of 1964, as amended, and prohibits discrimination and harassment in the workplace based on sex, race, national origin, color, and religion, created a Select Task Force on the Study of Harassment in the Workplace (Select Task Force).⁵⁷ The Select Task Force brought together experts from employers, employee groups, human resource organizations and academic institutions to

week [<https://perma.cc/LZC3-7G6G>]; Alieza Durana et al., #NowWhat: The Sexual Harassment Solutions Toolkit, NEW AMERICA, <https://www.newamerica.org/better-life-lab/reports/nowwhat-sexual-harassment-solutions-toolkit/> [<https://perma.cc/4899-GPL3>] (last updated Sept. 26, 2018); Karla Altmyer, *Bold Moves to End Sexual Violence: Centering the Most Vulnerable Women Workers in the #MeToo Movement*, MS. MAG. (Aug. 10, 2018), <https://msmagazine.com/2018/08/10/2018-national-sexual-assault-conference/> [<https://perma.cc/5DLK-MT7K>].

⁵² See Sandra E. Garcia, *The Woman Who Created #MeToo Long Before Hashtags*, N.Y. TIMES (Oct. 20, 2017), <https://www.nytimes.com/2017/10/20/us/me-too-movement-tarana-burke.html> [<https://perma.cc/A9SQ-7TLM>].

⁵³ See generally, *Ending Sexual Assault and Harassment in the Workplace*, NAT'L SEXUAL VIOLENCE RESOURCE CTR., <https://www.nsvrc.org/ending-sexual-assault-and-harassment-workplace> [<https://perma.cc/LV7P-W9P4>]; Frank Dobbin & Alexandra Kalev, *Why Sexual Harassment Programs Backfire*, HARV. BUS. REV. (May-June 2020), <https://hbr.org/2020/05/why-sexual-harassment-programs-backfire> [<https://perma.cc/PA92-795L>].

⁵⁴ See Lenora M. Lapidus, *If Sexual Harassment Is Illegal, Why Is It Rampant?*, ACLU (Jan. 18, 2018, 3:30 PM), <https://www.aclu.org/blog/womens-rights/womens-rights-workplace/if-sexual-harassment-illegal-why-it-so-rampant> [<https://perma.cc/3U5N-AJGW>].

⁵⁵ See Yuki Noguchi, *Low-Wage Workers Say #MeToo Movement is a Chance for Change*, NPR (Feb. 6, 2018, 4:59 AM), <https://www.npr.org/2018/02/06/583428098/low-wage-workers-say-metoo-movement-is-a-chance-for-change> [<https://perma.cc/NE3M-YN7S>].

⁵⁶ See *id.*

⁵⁷ See *Study of Harassment in the Workplace: Meeting of the Equal Employment Opportunity Commission Select Task Force* (Jan. 14, 2015) (statement of Jenny Yang, Co-Chair, Equal Employment Opportunity Commission Select Task Force), <https://www.eeoc.gov/eeoc/meetings/1-14-15/transcript.cfm#yang> [<https://perma.cc/G2J8-J96S>].

“identify strategies to prevent and remedy harassment in the workforce.”⁵⁸ The Select Task Force found that sixty percent of women experience unwanted sexual attention, sexual coercion, sexually crude conduct, or sexist comments in the workplace.⁵⁹ At the same time, more than eighty-five percent of people who experience harassment do not file a legal charge and seventy percent of employees do not complain internally at their workplace to a supervisor, manager, or union representative.⁶⁰ Reasons for the lack of reporting documented by the Select Task Force included humiliation, ostracism, damage to the complainant’s reputation and/or career, retaliation, inaction, self-blame, and disbelief that it was happening.⁶¹ Sadly, these fears are well-founded. Studies have found that reporting of sexual harassment is often followed by a lack of response, minimization of the harassment, and hostility and retaliation against the survivor.⁶² Workers who experience sexual harassment end up having to continue to experience the abuse or try to avoid the harasser, which sometimes includes leaving their job or workplace.⁶³ After its investigation, the Select Task Force issued a report which contained specific recommendations for the federal government, academia, employers, and policymakers focused on increased accountability and culture change, such as improvements to prevention policies, procedures, and training, among other things.⁶⁴

Less than two years after the Select Task Force issued its report and recommendations, in October 2017, the high-profile reporting by *The New York Times* of the decades-long sexual harassment and violence committed by Hollywood producer Harvey Weinstein against employees and actresses and the subsequent relaunch of the #MeToo hashtag brought renewed attention to the epidemic of sexual harassment in U.S. workplaces.⁶⁵ The sharing by thousands of women and men about their experiences with different forms of GBVH at work, including sexual harassment, changed the

⁵⁸ CHAIR R. FELDBLUM & VICTORIA A. LIPNIC, SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE (June 2016), <https://www.eeoc.gov/select-task-force-study-harassment-workplace> [<https://perma.cc/PN9N-GGFU>].

⁵⁹ *See id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.* (citing Lilia M. Cortina & Vicki J. Magley, *Raising Voice, Risking Retaliation: Events Following Interpersonal Mistreatment in the Workplace*, 8 J. OCCUPATIONAL PSYCHOL. 247 (2003) (finding that seventy-five percent of employees who spoke out against workplace mistreatment faced some form of retaliation)).

⁶³ *Id.*

⁶⁴ *Id.* at Part Four: Summary of Recommendations.

⁶⁵ Anna North, *7 Positive Changes That Have Come From the #MeToo Movement*, VOX (Oct. 4, 2019, 7:00 AM), <https://www.vox.com/identities/2019/10/4/20852639/me-too-movement-sexual-harassment-law-2019> [<https://perma.cc/B49X-J4AJ>].

landscape of how these abuses were understood and responded to forever.⁶⁶ Employers and policymakers are no longer able to ignore the high rates of sexual harassment in U.S. workplaces committed in all industries, regardless of income, gender identity, sexual orientation, race, immigration status, religion, and/or ability.⁶⁷ The exchange of experiences with sexual harassment by women led to building of solidarity which has propelled forward significant organizing to change the way policymakers, employers and workers respond to sexual harassment.⁶⁸ Importantly, it contributed to the development of a shared understanding about what sexual harassment is, its negative long-term impact on those targeted, as well as on their workplaces, their communities, and the national and global economy.⁶⁹ It also empowered former employees to come forward and renew reports of systemic sexual harassment from years ago committed by high-profile chefs,⁷⁰ television anchors,⁷¹ and entertainers,⁷² which led to their job loss. Finally, women and their allies came forward to demand changes in how employers and governments were attempting to prevent and address sexual harassment in their workplaces.⁷³

In September 2018, after several McDonald's employees had filed complaints of sexual harassment with the EEOC, employees staged a one day

⁶⁶ See *id.*; see also Garcia, *supra* note 52.

⁶⁷ See FELDBLUM & LIPNIC, *supra* note 58; see also North, *supra* note 65; Belen Fernandez, *Let's Face It: We Have an Epidemic of Sexual Harassment*, AL JAZEERA (Oct. 21, 2017), <https://www.aljazeera.com/opinions/2017/10/21/lets-face-it-we-have-an-epidemic-of-sexual-harassment> [https://perma.cc/8DYC-75S9].

⁶⁸ See Vicki Schultz, *Reconceptualizing Sexual Harassment, Again*, 128 YALE L.J. F. 22, 24–25 (2018) [hereinafter Schultz, *Sexual Harassment, Again*] (describing the solidarity and power brought about by #MeToo); see also 700,000 Female Farmworkers Say They Stand with Hollywood Actors Against Sexual Assault, TIME (Nov. 10, 2017, 11:11 AM), <https://time.com/5018813/farmworkers-solidarity-hollywood-sexual-assault/> [https://perma.cc/TP3E-3XZW].

⁶⁹ See FELDBLUM & LIPNIC, *supra* note 58; see also North, *supra* note 65.

⁷⁰ *The Chefs and Restaurateurs Accused of Sexual Harassment So Far*, BON APPETIT (Dec. 12, 2017), <https://www.bonappetit.com/story/chefs-restaurateurs-accused-sexual-harassment> [https://perma.cc/SZP6-QG67].

⁷¹ Ramin Setoodeh & Elizabeth Wagmeister, *Matt Lauer Accused of Sexual Harassment by Multiple Women (Exclusive)*, VARIETY (Nov. 29, 2017, 12:34 PM), <https://variety.com/2017/biz/news/matt-lauer-accused-sexual-harassment-multiple-women-1202625959/> [https://perma.cc/4ZGD-MQRX]; Amy Brittain & Irin Carmon, *Charlie Rose's Misconduct Was Widespread at CBS and Three Managers Were Warned, Investigation Finds*, WASH. POST (May 3, 2018, 3:00 AM), https://www.washingtonpost.com/charlie-roses-misconduct-was-widespread-at-cbs-and-three-managers-were-warned-investigation-finds/2018/05/02/80613d24-3228-11e8-94fa-32d48460b955_story.html [https://perma.cc/2WQ4-P5KA].

⁷² *Notable Entertainment Figures Accused of Sexual Misconduct in the Wake of Harvey Weinstein*, HOLLYWOOD REP. (Nov. 30, 2017, 2:23 PM), <https://www.hollywoodreporter.com/lists/hollywood-media-men-accused-of-sexual-misconduct-and-harassment-post-weinstein-1057193> [https://perma.cc/6SGG-7ZDW]; 262 *Celebrities, Politicians, CEOs, and Others Who Have Been Accused of Sexual Misconduct Since April 2017*, VOX, <https://www.vox.com/a/sexual-harassment-assault-allegations-list> [https://perma.cc/79GH-8BBA] (last updated Jan. 9, 2019).

⁷³ See North, *supra* note 65.

strike in ten U.S. cities including Chicago, Los Angeles, and Miami to protest the continuing problem of sexual harassment on the job.⁷⁴ Then, in October 2018, twenty thousand Google employees around the world walked out from their jobs, protesting how the company handled sexual harassment complaints—not only failing to hold perpetrators accountable, but paying them millions of dollars in separation packages—by demanding an end to forced arbitration in harassment and discrimination cases, a publicly disclosed sexual harassment transparency report, and a clear, uniform and inclusive process for reporting on sexual misconduct safely and anonymously, among other things.⁷⁵ These are examples of workers coming together with newfound solidarity about their experiences with sexual harassment and their demand that they refused to continue to have it be considered a part of their job. Unions and collective action have been shown to effectively prevent and address sexual harassment by addressing the inherent power imbalances between workers and employers in the U.S. and elsewhere.⁷⁶

National, state and local women's rights, workers' rights, and civil rights advocates also came together to demand policy and legislative change.⁷⁷ In

⁷⁴ Hannah Keyser, *McDonald's Workers Are Going on Strike to Protest Sexual Harassment*, VICE (Sep. 12, 2018, 5:20 PM), <https://www.vice.com/en/article/wjy85n/mcdonalds-workers-are-going-on-strike-to-protest-sexual-harassment> [<https://perma.cc/D58C-SV7X>].

⁷⁵ Daisuke Wakabayashi et al., *Google Walkout: Employees Stage Protest Over Handling of Sexual Harassment*, N.Y. TIMES (Nov. 1, 2018), <https://www.nytimes.com/2018/11/01/technology/google-walkout-sexual-harassment.html> [<https://perma.cc/AC3R-U8YQ>]; Adi Robertson, *Google Organizers Call for New Harassment Policies Amid Mass Walkout*, THE VERGE (Nov. 1, 2018, 2:02 PM), <https://www.theverge.com/2018/11/1/18051756/google-walkout-sexual-harassment-policy-reform-new-york-protest> [<https://perma.cc/7VT3-Q2HT>]; Nick Statt, *Over 20,000 Google Employees Participated in Yesterday's Mass Walkout*, THE VERGE (Nov. 2, 2018, 8:25 PM), <https://www.theverge.com/2018/11/2/18057716/google-walkout-20-thousand-employees-ceo-sundar-pichai-meeting> [<https://perma.cc/G76Y-SR93>]. This led to the creation of a union at Google in California for the first time. See Matt O'Brien, *Google Workers Form New Labor Union, A Tech Industry Rarity*, AP NEWS (Jan. 4, 2021), <https://apnews.com/article/google-workers-unionize-technology-cc67e2f901fa5b59d73b9dac1892d0b3> [<https://perma.cc/333L-FV8T>].

⁷⁶ See, e.g., Mark Anner, *What Difference Does a Union Make?*, SOLIDARITY CTR. (Jan. 2021), https://www.solidaritycenter.org/wp-content/uploads/2021/01/What-Difference-Does-a-Union-Make_January-2021-1.pdf [<https://perma.cc/3X8T-URYK>] (reporting that fifty-eight percent of women surveyed in non-union banana packing plants say they face sexual harassment and other forms of GBVH at work compared to eight percent of women at unionized packing plants); see also HANDS OFF PANTS ON, <https://www.handsoffpantson.org/> [<https://perma.cc/6S8P-JQT5>] (last visited Mar. 8, 2021); Press Release, Hands Off Pants On, *Unite Here Local 1 Rings in a New Day for Chicago Hotel Workers As City's Landmark "Hands Off Pants On" Law Takes Full Effect*, <https://www.handsoffpantson.org/unite-here-local-1-rings-in-a-new-day-for-chicago-hotel-workers-as-citys-landmark-hands-off-pants-on-law-takes-full-effect/> [<https://perma.cc/S8E3-QLV3>] (last visited Mar. 8, 2021) (describing a successful union led effort to adopt citywide legislation in Chicago to require hotels and casinos to provide panic buttons to their workers so that they can seek protection when being targeted for sexual or gender-based violence).

⁷⁷ See *A Call for Legislative Action to Eliminate Workplace Harassment*, ACLU (Dec. 2018), <https://www.aclu.org/other/workplace-harassment-legislative-principles-and-priorities> [<https://perma.cc/T8X2-C7CZ>] [hereinafter ACLU, *Workplace Harassment*].

December 2018, leading civil rights, social justice, and women's rights organizations, including The Leadership Conference on Civil and Human Rights, issued their priorities for legislative action to eliminate workplace harassment.⁷⁸ They called for reforms to state and federal laws to better address and prevent all forms of discrimination and harassment—not only sexual harassment—by recognizing the intersectional nature of abuse and harassment experienced by different workers based upon their overlapping and intersecting identities such as gender, race, ability, age, national origin, or religion.⁷⁹ This intersectionality, they recognized, required a similarly intersectional and comprehensive response.⁸⁰ They also demanded that reforms addressing harassment and discrimination be extended to workers who are not currently covered by existing federal anti-discrimination employment laws, including guestworkers, independent contractors, domestic workers, unpaid interns, and those in non-traditional employment relationships.⁸¹ In addition, their call to action stated that policy reform must require that employers provide annual trainings for all supervisors and employees, and must provide multiple internal reporting mechanisms, including options for confidential and/or anonymous reporting.⁸²

Earlier in 2018, the National Academies of Sciences, Engineering, and Medicine issued a Consensus Study Report on Sexual Harassment of Women, which contained recommendations to address sexual harassment in higher education that highlighted the need to expand the traditional legal definition of sexual harassment.⁸³ The report specifically focused on the need for system-wide changes to the culture and climate to prevent and respond to sexual harassment.⁸⁴ It boldly stated what was broadly being recognized—that there is no evidence that existing policies, procedures and trainings have reduced sexual harassment in workplaces.⁸⁵ The Report recommended that colleges and universities go beyond basic legal compliance to adopt policies and practices that are holistic and evidence-based to address and prevent all forms of sexual harassment and to promote a culture of civility and respect.⁸⁶ It also stated that addressing and preventing sexual harassment requires

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ NAT'L ACADS. OF SCI., ENG'G, MED., SEXUAL HARASSMENT OF WOMEN: CLIMATE, CULTURE, AND CONSEQUENCES IN ACADEMIC SCIENCES, ENGINEERING, AND MEDICINE 93 (Paula A. Johnson et al. eds., The Nat'l Acad. Press 2018).

⁸⁴ *Id.* at 6.

⁸⁵ *Id.* at 176.

⁸⁶ *Id.* at 163–67.

addressing gender harassment, unwanted sexual attention and sexual coercion.⁸⁷

Finally, the American Bar Association adopted two different policy resolutions in 2018 intended to strengthen its position against sexual harassment from 1992, urging employers in the legal profession to prohibit, prevent, and promptly address sexual harassment and retaliation claims, and to urge governments and international institutions to adopt and implement legislation and regulations to eliminate, prevent, and provide remedies for gender-based violence in the workplace, including sexual harassment.⁸⁸

This groundswell of grassroots and political activism led to the introduction and adoption of a significant amount of policies, and state and federal legislation intended to change the culture in American workplaces, improve mechanisms for targets of harassment to come forward with complaints, and tackle some barriers to holding employers accountable for sexual harassment.⁸⁹ In March 2019, members of the House of Representatives introduced the Ending the Monopoly of Power over Workplace Harassment through Education and Reporting (EMPOWER Act) to establish a confidential tip-line at the U.S. Equal Employment Opportunity Commission to receive reports about harassment and target employers that continue to allow for systemic harassment in the workplace.⁹⁰ It also requires public companies to disclose the number of settlements, judgments, and aggregate settlement amounts in connection with workplace harassment and requires development and dissemination of workplace training programs to educate at all levels about what constitutes prohibited workplace harassment and how to prevent it, how to report it, and how bystanders can support their coworkers.⁹¹ In April 2019, members of Congress introduced the Bringing an End to Harassment by Enhancing Accountability and Rejecting Discrimination in the Workplace Act (BE HEARD Act)⁹² which incorporated several recommendations from the Leadership Conference and the Select

⁸⁷ See *id.* at 170.

⁸⁸ AM. BAR ASS'N, RESOLUTION 302 (Feb. 5, 2018), https://www.americanbar.org/content/dam/aba/administrative/crsj/2018_mm_302.authcheckdam.pdf [<https://perma.cc/ES23-KAJ3>]; AM. BAR ASS'N, RESOLUTION 300 (Aug. 7, 2018), <https://www.americanbar.org/content/dam/aba/directories/policy/2018-annual/2018-am-300.pdf> [<https://perma.cc/P2SL-Z2K5>]. See also *ABA Adopts New Policy to Combat Sexual Harassment in the Legal Workplace*, AM. BAR ASS'N (Feb. 6, 2018), https://www.americanbar.org/news/abanews/aba-news-archives/2018/02/aba_adopts_new_polic/ [<https://perma.cc/CW86-BPFJ>].

⁸⁹ See Khadija Murad, *Sexual Harassment in the Workplace*, NCSL (Feb. 17, 2020), <https://www.ncsl.org/research/labor-and-employment/sexual-harassment-in-the-workplace.aspx> [<https://perma.cc/G4F4-598P>].

⁹⁰ H.R. 1521, 116th Cong. (2019).

⁹¹ *Id.*

⁹² S. 1082, 116th Cong. (2019); H.R. 2148, 116th Cong. (2019).

Task Force.⁹³ The omnibus bill intends to address discrimination and harassment in employment by tackling several barriers together.⁹⁴ It would eliminate the tipped minimum wage, which is linked to high rates of sexual harassment in the restaurant industry, and end mandatory arbitration and pre-employment nondisclosure agreements, which have limited access to remedies and information about harassment claims.⁹⁵ In addition, as of December 2020, 230 bills had been introduced into state legislatures to improve protections against workplace harassment and nineteen states had adopted legislation.⁹⁶ These included fifteen states limiting or prohibiting employers from requiring employees to sign nondisclosure agreements as a condition of employment or as a part of a settlement agreement; eleven states and New York City implemented or strengthened anti-harassment training requirements for certain groups of employers; seven states enacted laws requiring or encouraging employer anti-harassment policies; seven states limited employers' use of forced arbitration agreements; and six states expanded workplace harassment protections to include independent contractors, interns and/or volunteers for the first time.⁹⁷

Although there has been some significant progress made with the passage of various state legislation, neither the EMPOWER Act nor the BE HEARD Act have been passed, and many of the issues identified by the U.S. Equal Employment Opportunity Commission's Select Task Force, the Leadership Conference, National Academies of Sciences, Engineering and Medicine, and the ABA have remained unaddressed.⁹⁸ In particular, the call for expanding the range of abuses to be prohibited beyond sexual harassment to include more of the forms of GBVH experienced by all workers, the recognition of the need for an approach that changes the cultures in workplaces by addressing the underlying causes of GBVH, and the need for employers to identify and address risk factors and take steps toward structural change that no longer tolerates any form of harassment and violence in the workplace remain unanswered. The language contained in and the approaches used by ILO Convention 190 and Recommendation 206 address these issues and provide direction as to how to take on these necessary

⁹³ ACLU, *Workplace Harassment*, *supra* note 77.

⁹⁴ S. 1082; H.R. 2148.

⁹⁵ S. 1082; H.R. 2148.

⁹⁶ *See generally* ANDREA JOHNSON, RAMYA SEKARAN & SASHA GOMBAR, NAT'L WOMEN'S L. CTR., 2020 PROGRESS UPDATE: ME TOO WORKPLACE REFORMS IN THE STATES (Sep. 2020), https://nwlc.org/wp-content/uploads/2020/09/v1_2020_nwlc2020States_Report-MM-edits-11.11.pdf [<https://perma.cc/H9UW-5A3R>].

⁹⁷ *Id.* at 3.

⁹⁸ *Id.*

changes and others to improve efforts at preventing and addressing these abuses in workplaces in the U.S.

B. A Global Labor Standard to End Gender-Based Violence and Harassment in the World of Work

Several years before the Select Task Force issued its report and recommendations and the launch of #MeToo, trade unions around the world, led by women union activists and global labor federations, were advocating for a global labor standard to be adopted by the International Labor Organization (ILO) to address gender-based violence (GBV) in the workplace, having identified it as a primary barrier to gender equality and decent and safe work for all.⁹⁹

In 2015, the United Nations (UN) adopted the Sustainable Development Goals (SDGs) to provide accountability for governments on economic and social development, including decent work (Goal 8) and gender equality (Goal 5).¹⁰⁰ Goal 5 includes targets on ending “all forms of discrimination against all women and girls everywhere”; eliminating “all forms of violence against all women and girls in the public and private spheres,” and adopting and strengthening “sound policies and enforceable legislation for the promotion of gender equality and the empowerment of all women and girls at all levels.”¹⁰¹

The ILO is a part of the UN and the only international entity within the UN where governments, employers, and workers participate in tripartite negotiations to create labor standards that apply to all members.¹⁰² The ILO has a membership of 187 states, including the United States, from around the world who negotiate with worker and employer representatives to adopt its international labor standards.¹⁰³ As a result of extensive, multi-year global advocacy campaigns led by women worker advocates and their feminist,

⁹⁹ See generally INT'L TRADE UNION CONFEDERATION, CAMPAIGN TOOLKIT: STOP GENDER-BASED VIOLENCE AT WORK (2018), <https://www.ituc-csi.org/campaign-toolkit-stop-gender-based> [<https://perma.cc/3YLD-K5FT>]; JANE PILINGER, INT'L LABOUR ORG., VIOLENCE AGAINST WOMEN AND MEN IN THE WORLD OF WORK: TRADE UNION PERSPECTIVES AND ACTION (2017), https://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---actrav/documents/publication/wcms_546645.pdf [<https://perma.cc/8N32-USS4>].

¹⁰⁰ See generally *The Sustainable Development Agenda*, UNITED NATIONS, <https://www.un.org/sustainable-development/development-agenda/> [<https://perma.cc/2K85-VKC5>].

¹⁰¹ *Goal 5: Achieve Gender Equality and Empower All Women and Girls*, UNITED NATIONS, <https://sdgs.un.org/goals/goal5> [<https://perma.cc/7ZEN-BCU7>] (last visited Mar. 20, 2021).

¹⁰² Member States, INT'L LABOUR ORG. (2021), <https://www.ilo.org/global/about-the-ilo/how-the-ilo-works/member-states/lang--en/index.htm> [<https://perma.cc/Q4FN-3A2K>]; How the ILO Works, INT'L LABOUR ORG. (2021), <https://www.ilo.org/global/about-the-ilo/how-the-ilo-works/lang--en/index.htm> [<https://perma.cc/J4NV-WAPU>] [hereinafter How the ILO Works].

¹⁰³ How the ILO Works, *supra* note 102.

human rights and women's rights allies to end gender-based violence in the world of work, in November 2015, the ILO agreed to place a standard on their standard-setting agenda to address violence and harassment in the world of work.¹⁰⁴

Trade unionists, led by the ITUC and women leaders, with global human rights and workers' rights non-governmental organizational allies, continued their organizing and advocacy to ensure that the instrument(s) adopted by the ILO would include a focus on GBVH in the world of work.¹⁰⁵ In October 2016, the ILO held a Meeting of Experts to provide guidance for the development of the global labor standard at which representatives of employers, governments, and workers' groups participated.¹⁰⁶ Sexual harassment was addressed at the meeting as an expression of sexual violence, including quid pro quo and hostile work environment,¹⁰⁷ that could involve a range of behaviors, including sex-based comments (which need not be sexual in nature), disparaging remarks about the sex of the victims, innuendos, and the display of sexually or explicit material and a single incident is enough, though it often involves repeated behaviors.¹⁰⁸ Gender-based violence was described as physical, psychological and sexual violence "if it stems from unequal power relationships between men and women or if it is perpetrated against people because they do not conform to socially accepted gender roles."¹⁰⁹ In addition, the group recognized that unequal power relations are often a root cause of violence in the world of work.¹¹⁰ These power relationships manifest themselves in the fact that racialized groups,

¹⁰⁴ See Decision on the Second Item of the Agenda: Agenda of the International Labour Conference, INT'L LABOUR ORG. (Nov. 16, 2015), https://www.ilo.org/gb/decisions/GB325-decision/WCMS_425655/lang--en/index.htm [<https://perma.cc/93QH-HXZF>].

¹⁰⁵ *Id.*

¹⁰⁶ See INT'L LABOUR ORG., FINAL REPORT - MEETING OF EXPERTS ON VIOLENCE AGAINST WOMEN AND MEN IN THE WORLD OF WORK (Oct. 2016), https://www.ilo.org/wcmsp5/groups/public/---dgreports/---gender/documents/meetingdocument/wcms_546303.pdf [<https://perma.cc/UK28-3KJC>].

¹⁰⁷ See *id.* at 6. In 2003, the ILO adopted a similar definition of sexual harassment to the one adopted in the U.S.: "sex-based behavior that is unwelcome and offensive to its recipient." The definition includes two forms: quid pro quo—when a job benefit such as a pay raise, promotion or continued employment is conditioned on the victim acceding to demands to engage in some form of sexual behavior, and hostile work environment in which the conduct creates conditions that are intimidating or humiliating for the victim. *Sexual Harassment at Work Fact Sheet*, INT'L LABOUR OFFICE, https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_decl_fs_96_en.pdf [<https://perma.cc/SL7T-ER7Q>].

¹⁰⁸ INT'L LABOUR ORG., BACKGROUND PAPER: MEETING OF EXPERTS ON VIOLENCE AGAINST WOMEN AND MEN IN THE WORLD OF WORK 4 (Oct. 2016), https://www.ilo.org/wcmsp5/groups/public/---dgreports/---gender/documents/meetingdocument/wcms_522932.pdf [<https://perma.cc/J3NR-3R36>].

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

indigenous workers, migrant workers, LGBTQ+ workers and young workers are most often victims of violence and harassment in the workplace.¹¹¹

As the report issued from the Expert Meeting indicates, the women workers who participated in the Experts Meeting ensured gender-based violence was prioritized, which influenced the drafting of the questionnaire that the ILO circulated in Spring 2017 for the standard, retitled Ending Violence and Harassment Against Men and Women in the World of Work.¹¹² The report included statements by experts that suggested replacing the term “violence” with “violence and harassment” in the title of the item “to ensure the range of unacceptable behaviour is adequately understood and addressed.”¹¹³

In accordance with article 39(1) of the Standing Orders of the Conference, the International Labour Office prepared a preliminary report (Report V(1)) setting out the law and practice in different countries, together with a questionnaire, which was sent to member States in May 2017.¹¹⁴ Member States were invited to submit their responses to the questionnaire by September 22, 2017 after consultation with the most representative organizations of employers and workers.¹¹⁵ The questionnaire was seeking input into the text of the instrument(s) with the revised title for the standard, Ending Violence and Harassment in the World of Work.¹¹⁶

As a result of the extensive global union advocacy led by the ITUC, the ILO received the highest number of responses ever from workers’ organizations (179) to the questionnaire issued by the International Labor Office for input into the form and content of a standard to end violence and harassment in the world of work.¹¹⁷ In addition, a total of eighty-five governments sent their replies to the Office. Replies were received from the International Organization of Employers (IOE) and the International Trade Union Confederation (ITUC) as well as Public Services International (PSI), the International Domestic Workers Federation (IDWF), IndustriALL, the

¹¹¹ See INT’L LABOUR ORG., WORLD EMPLOYMENT SOCIAL OUTLOOK (2016), https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/--publ/documents/publication/wcms_443480.pdf [<https://perma.cc/5EUX-NUPP>].

¹¹² See INT’L LABOUR ORG., REPORT V(2): ENDING VIOLENCE AND HARASSMENT AGAINST WOMEN AND MEN IN THE WORLD OF WORK, THE FIFTH ITEM ON THE AGENDA (2018), https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_619730.pdf [<https://perma.cc/P5PM-4F9E>] [hereinafter REPORT V(2)].

¹¹³ *Id.* at 2.

¹¹⁴ See INT’L LABOUR ORG., REPORT V(1): ENDING VIOLENCE AND HARASSMENT AGAINST WOMEN AND MEN IN THE WORLD OF WORK, THE FIFTH ITEM ON THE AGENDA (2018), <https://16dayscampaign.org/wp-content/uploads/2018/11/Ending-Violence-and-Harassment-Against-Women-and-Men-ILO.pdf> [<https://perma.cc/D5UZ-K23Q>].

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ REPORT V(2), *supra* note 112, at 1.

International Federation of Journalists (IFJ), the International Transport Workers' Federation (ITF), the International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers' Associations (IUF) and the United Food and Commercial Workers International Union (UFCW).¹¹⁸ The ILO also received responses from twenty-nine employers' organizations.¹¹⁹ Replies were also received from the Dattopant Thengadi National Board for Workers' Education and Development (DTMBWED) and from other stakeholders, including civil society organizations such as CARE International, Oxfam International, the International Women's Rights Action Watch (IWRAW), the International Committee on the Rights of Sex Workers in Europe (ICRSE), the Global Network of Sex Work Projects (NSWP) and the European Network for the Promotion of Rights and Health among Migrant Sex Workers (TAMPEP).¹²⁰

In March 2018, the ILO issued the "Yellow Report," which included a summary of responses to the questionnaire, as well as proposed conclusions incorporating the replies received from governments, organizations of employers and workers to the questionnaire in 2017.¹²¹ In the Yellow Report, the ILO provided commentary immediately after the replies to each question summarizing the responses received.¹²² The proposed conclusions, which served as the first draft of the convention and the recommendation at the negotiations in May through June 2018 at the International Labour Conference were included at the end of the report, as well as a chart listing all of the responding organizations and their responses to each question.¹²³ In preparing the report and proposed conclusions, the ILO had also taken into consideration the input and views expressed during the aforementioned tripartite Meeting of Experts.¹²⁴

Specifically, the draft instruments included a binding convention and a recommendation, inclusion of a separate definition of gender-based violence, a broad definition of worker inclusive of informal and migrant workers, and the world of work, and the inclusion of language regarding the need to address structural inequality as a risk factor for gender-based violence and other forms of violence and harassment.¹²⁵ This was due, in large part, to the significant advocacy, education, and awareness raising conducted by trade unions about the critical need for an ILO binding convention that was not just

¹¹⁸ *Id.* at 3.

¹¹⁹ *Id.* at 1.

¹²⁰ *Id.*

¹²¹ *See id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.* at 2.

¹²⁵ *Id.*

inclusive of gender-based violence but centered around it. This global campaign to end gender-based violence in the world of work, led by the ITUC, resulted in the overwhelming number of comments submitted by unions and member States in support of the key language and focus identified by women trade unionists. These definitions and the recognition of the need for an intersectional approach remained a critical part of the negotiations moving forward.

On June 21, 2019, after two years of negotiations, the ILO's members adopted landmark, first-of-its-kind international instruments to address and prevent violence and harassment in the world of work, including GBVH.¹²⁶ ILO Convention 190, which has treaty status in international law, is supplemented by Recommendation 206,¹²⁷ which provides guidance to help governments, employers and worker organizations implement the Convention.¹²⁸ The Convention was adopted with 439 votes from states, employers and workers' organizations in support, including the United States, seven against and thirty abstentions; and the Recommendation was adopted with 397 votes in support, twelve against and forty-four abstentions,¹²⁹ demonstrating a clear global mandate to end violence and harassment in the world of work, including GBVH.

ILO Convention 190 is the first binding international instrument to recognize the right to a world of work free from violence and harassment, including GBVH, and it requires ratifying governments to respect, promote, and realize this right.¹³⁰ It also recognizes that violence and harassment in the world of work, including GBVH, can constitute a human rights violation.¹³¹ It provides, for the first time, a common global definition of violence, harassment, and GBVH in the world of work.¹³² Another critical aspect of ILO Convention 190 is that it addresses the impact of domestic violence in the world of work.¹³³

ILO Convention 190 and Recommendation 206 provide a road map for member states to implement that is expressly feminist, inclusive, and

¹²⁶ See ILO Convention No. 190, *supra* note 1, at 1, 6.

¹²⁷ Violence and Harassment Recommendation, 2019 (No. 206), INT'L LABOUR ORG. (2019), https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:R206 [<https://perma.cc/MAS6-3MFG>].

¹²⁸ *Id.*

¹²⁹ INT'L LABOUR ORG., OUTCOMES OF THE WORK OF THE STANDARD-SETTING COMMITTEE ON VIOLENCE AND HARASSMENT IN THE WORLD OF WORK 23 (2019), https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_713904.pdf [<https://perma.cc/C8FV-BY74>].

¹³⁰ See generally ILO Convention No. 190, *supra* note 1.

¹³¹ *Id.* at 1.

¹³² *Id.* at 5.

¹³³ *Id.* at 1, 10.

intersectional in its approach, incorporating the recognition of a need for states to address the root causes and risk factors for GBVH in the world of work. United States policymakers and employers need not wait for ratification to implement its provisions.

III. IMPROVING UNITED STATES RESPONSES TO SEXUAL HARASSMENT BY IMPLEMENTING ILO CONVENTION 190

This section contains an analysis of existing federal legal theory and policy addressing sexual harassment in the U.S. and explains how integration of specific provisions of ILO Convention 190 would improve efforts to prevent sexual harassment in expanding the range of prohibited gender and sex-based violence and harassment; expanding the categories of workers protected from GBVH, and providing a framework for addressing structural and cultural root causes of GBVH.

A. Adopting the Definition of Violence and Harassment and Gender-Based Violence and Harassment in the World of Work from ILO Convention 190

Over twenty years ago, Vicki Schultz proposed a theory of sexual harassment that advocated for an understanding beyond a focus on sex and sexual attraction to include that male workers harass to maintain institutionalization of the social construction of gender, which subjugates women to men based on their gender identity.¹³⁴ Schultz and others have articulated clearly that harassment based on gender and sex is a way for men in the workplace to maintain their position of authority, rather than based on sexual desire and this needs to be incorporated into sexual harassment legal theory and protections.¹³⁵ Since her first pair of articles establishing this theory, social science researchers and legal scholars have applied her reasoning, asserting that the most common forms of sexual harassment are gender-based, designed to pressure, scare, intimidate, threaten, humiliate, and demean the victim and that a broad understanding of gender-based harassment in the workplace must be cognizable under law.¹³⁶ There is

¹³⁴ See Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683 (1998) [hereinafter Schultz, *Sexual Harassment*]; Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061 (2003) [hereinafter Schultz, *Sanitized Workplace*].

¹³⁵ See Schultz, *Sexual Harassment*, *supra* note 134; Schultz, *Sanitized Workplace*, *supra* note 134; Rachel Arnow-Richman, *Of Power and Process: Handling Harassers in an At-Will World*, 128 YALE L.J. F. 85, 88–89 (2018) [hereinafter Arnow-Richman, *Power and Process*] (noting that “the popular conception of sexual harassment not only ignores discrimination as a central element of sexual harassment, it also disregards the inherent power dynamics of the typical employment environment”).

¹³⁶ See Schultz, *Sexual Harassment*, *supra* note 134; Schultz, *Sanitized Workplace*, *supra* note 134; see also Arnow-Richman, *Power and Process*, *supra* note 135, at 88–89.

increasing consensus that a primary motive for harassment is to protect and maintain the harasser's social status and power when they feel it is being threatened.¹³⁷ Incorporating this understanding of the root causes of sexual harassment, that it is a tool for maintaining existing unequal gender power relationships, into legal and policy responses preventing and addressing GBVH, including sexual harassment, is essential in order for it to be effective. This analysis is beginning to develop in interpretations of state and federal laws and policies addressing sexual harassment, but amending the definition of prohibited abuses to expressly include GBVH would advance enforcement and prevention efforts significantly.

The framework in U.S. federal law that prohibits sexual harassment in employment has developed through judicial interpretation of Title VII of the Civil Rights Act of 1964, as amended, which prohibits, inter alia, sex discrimination in employment.¹³⁸ Sexual harassment is defined as:

[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute . . . when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.¹³⁹

The U.S. Supreme Court has held that actionable sexual harassment must be unwelcome and sufficiently severe or pervasive from the perspective of a reasonable person to alter the terms or conditions of the plaintiff's employment and that the plaintiff subjectively perceived it to be severe or pervasive.¹⁴⁰ In *Harris v. Forklift Systems*, the Court further held that a plaintiff need not prove psychological harm to plead a successful sexual harassment claim.¹⁴¹

¹³⁷ See, e.g., Jennifer L. Berdahl, *Harassment Based on Sex: Protecting Social Status in the Context of Gender Hierarchy*, 32 ACAD. MGMT. REV. 641 (2007).

¹³⁸ 42 U.S.C. § 2000e (2018); *Meritor Sav. Bank FSB v. Vinson*, 477 U.S. 57, 60 (1986); see, e.g., 29 C.F.R. § 1604.11(a) (defining sexual harassment as “[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature”); *Jin v. Metro. Life Ins. Co.*, 310 F.3d 84, 94 (2d Cir. 2002) (stating that sexual assault is a recognized form of sexual harassment under Title VII by noting that “[r]equiring an employee to engage in unwanted sex acts is one of the most pernicious and oppressive forms of sexual harassment that can occur in the workplace”).

¹³⁹ See 29 C.F.R. § 1604.1(a).

¹⁴⁰ *Meritor Sav. Bank*, 477 U.S. at 67 (“For sexual harassment to be actionable, it must be sufficiently severe or pervasive “to alter conditions of the victim’s employment and create an abusive environment.”).

¹⁴¹ See *Harris v. Forklift Systems*, 510 U.S. 17 (1993).

In line with the increased understanding of discrimination and harassment in the workplace, Title VII's prohibition of sex discrimination has been interpreted to include both sex and gender discrimination and harassment, where gender refers to the social construction and stereotypes associated with gender identity.¹⁴² In *Price Waterhouse v. Hopkins*, a female employee successfully sued her employer alleging that it had committed sex discrimination prohibited by Title VII when it refused to promote her because she did not conform to traditional stereotypes about how a woman should behave and dress.¹⁴³ The U.S. Supreme Court has also held that the harassment need not be sexual to be illegal under Title VII; instead the focus is on whether it is "because of sex."¹⁴⁴ In *Oncale v. Sundowner Offshore Servs. Inc.*, the Court recognized that creation of an illegal hostile work environment is sex discrimination that occurs because of the sex of the victim and does not require that the employee committing the harassment be motivated by sexual attraction or that the behavior be sexual in nature.¹⁴⁵ The Court found harassment between employees for gendered reasons may also be prohibited sexual harassment under Title VII.¹⁴⁶ Thus, illegal sex harassment could include circumstances when a male employee is harassing a female employee because he does not want women in that workplace, either because he does not believe women belong there or he is afraid they will take his job, or because the woman does not meet his socially constructed, gender-based stereotype.¹⁴⁷

The recent expanded interpretation of Title VII by the U.S. Supreme Court in 2020 to prohibit discrimination based on gender identity and sexual orientation has also broadened the protections against sexual harassment to a larger group of workers who disproportionately are targeted.¹⁴⁸ In *Bostock v. Clayton County, Ga.*, the U.S. Supreme Court found in favor of two employees who alleged that they had been fired in violation of their right to be free from sex discrimination when they were fired for being transgender.¹⁴⁹ In particular, the Court determined that the term "sex" includes gender identity and that an employer violates Title VII's prohibition

¹⁴² *Id.*

¹⁴³ See *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

¹⁴⁴ See *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ ANN C. MCGINLEY, *MASCULINITY AT WORK: EMPLOYMENT DISCRIMINATION THROUGH A DIFFERENT LENS* 40 (NYU Press 2016) (citing McGinley (2008)).

¹⁴⁸ See *Bostock v. Clayton County, Ga.*, 140 S.Ct. 1731 (June 15, 2020) (holding that an employer who fired an individual merely for being gay or transgender violates Title VII).

¹⁴⁹ *Id.*

against sex discrimination when it intentionally terminates an employee based in part on their sex.¹⁵⁰

Although the U.S. Supreme Court has interpreted Title VII to prohibit sexual harassment that is non-sexual in nature and has recognized that sexual harassment may include harassment based on gender stereotypes, these forms of sexual harassment persist in part because these cases are difficult to prove, and not often successful if brought at all.¹⁵¹ The public and policymakers continue to focus on sex-based harassment and violence rather than the more frequent and intersectional gender-based forms of harassment and violence that occur in workplaces and continue to oppress women and other vulnerable workers.¹⁵² For example, the reporting of the sexual assaults committed by Harvey Weinstein against his employees and actors seeking to work on one of his films focused on his sexual attraction, and sexual attraction seemed to be a prerequisite for the behavior to be considered sexual harassment. The focus on the age, appearance, and “sexiness” of the women he assaulted was most relevant, rather than the significant power imbalance that existed between Mr. Weinstein and his targets based on gender, age and influence, and how he used the violence as a form of power and control.¹⁵³ At the same time, many women who disclosed their experiences with sexual harassment on social media platforms during the resurrection of the #MeToo movement in October 2017 described unwanted gendered touching, systemic denial of access to promotions because of their gender, and being threatened physically or with their employment if they complained, and continuous exposure to demeaning and demoralizing male-dominated work environments in which they felt their safety was threatened.¹⁵⁴

Moreover, proving that the harassment is unwelcome and sufficiently severe or pervasive continues to be a barrier that is very difficult to overcome based on the narrow interpretations of these terms by courts. Most workplaces have incorporated the definition of sexual harassment under Title

¹⁵⁰ *Id.*

¹⁵¹ See, e.g., *Gregory v. Daly*, 243 F.3d 687, 695 (2d Cir. 2001); *Sexual Harassment*, U.S. EQUAL EMP’T OPPORTUNITY COMM’N, <https://www.eeoc.gov/sexual-harassment> [<https://perma.cc/M62F-6EWA>] (last visited Mar. 8, 2021).

¹⁵² See Schultz, *Sexual Harassment, Again*, *supra* note 68, at 30, 33–34 (remarking that #MeToo disclosures have been mostly focused on sex-based harassment including sexual violence and sexual attraction and that “nonsexual forms of sex-based harassment and hostility are far more prevalent than unwanted sexual overtures”).

¹⁵³ *Id.*

¹⁵⁴ See Rachel Arnow-Richman, *Finding Balance, Forging a Legacy: Harassers’ Rights and Employer Best Practices in the Era of MeToo*, 54 U.S.F.L. REV. 1, 10–11 (describing the range of sexual and gender based harassment and violence highlighted through the #MeToo movement that falls outside of the legal definition of harassment including an offensive but isolated incident).

VII into their workplace policies as the conduct that is prohibited.¹⁵⁵ In addition to requiring the survivor to prove that the abuse is sufficiently severe or pervasive, this definition is not clearly inclusive of sexual harassment unrelated to sexual attraction or sex, nor does it mention gender-based violence and harassment. This contributes to why a high percentage of the GBVH experienced by workers goes unreported under the current federal anti-discrimination legal framework that fails to prohibit a broader range of abuses.¹⁵⁶

Efforts to prevent and eliminate sexual harassment in U.S. workplaces would be significantly more effective if workplace policies, collective bargaining agreements, and federal and state law was amended to include the definitions of violence and harassment and GBVH from ILO Convention 190 because they include the broader range of abuse grounded in maintaining unequal power dynamics based on gender. If this definition of GBVH were incorporated into U.S. federal employment law, it would assist in prevention efforts by clearly stating that the broader range of violence and harassment based on sex and gender experienced by workers is prohibited.

ILO Convention 190 contains only two definitions: one for violence and harassment, which expressly includes GBVH, and a separate definition for GBVH. It defines violence and harassment in the world of work as “a range of unacceptable behaviors and practices, or threats thereof, whether a single occurrence or repeated, that aim at, result in, or are likely to result in physical, psychological, sexual or economic harm and includes gender-based violence and harassment.”¹⁵⁷ Importantly, this definition incorporates a recognition that the abuse may be a one-time occurrence, and includes a range of abuses consistent with the experiences of low wage and contingent working women. In addition, this definition includes behaviors, practices, or threats that aim at, result in, or are likely to result in a variety of harms. This is critical because it is explicit that the intent to do the harm caused by the abuse is not required. It also recognizes that violence and harassment in the world of work is inclusive of but not limited to what is traditionally considered criminal behavior by naming physical, psychological, sexual, or economic harms. This definition of harms is consistent with the evolving understanding of domestic violence to include coercive control as well as traditional criminal

¹⁵⁵ *Id.*

¹⁵⁶ As described in Part II of this Article, employees who believe that they have experienced sexual harassment in the workplace rarely report it to their employer, and if they do, they are most often required to take their complaint to arbitration instead of court. In addition, until recently a high percentage of employees who settled their claims were required to sign non-disclosure agreements as a condition of settlement, so very few survivors seek remedies in the court system in the U.S.

¹⁵⁷ ILO Convention No. 190, *supra* note 1, at 5.

acts and threats thereof.¹⁵⁸ Finally, the definition of violence and harassment includes GBVH, affirming that it is one of the most prevalent forms of violence and harassment.

ILO Convention 190 goes on to define GBVH as “violence and harassment directed at persons because of their sex or gender or affecting persons of a particular sex or gender disproportionately and includes sexual harassment.”¹⁵⁹ This definition of GBVH at work includes: physical abuse, sexual violence including rape and sexual assault, verbal abuse and threats of violence, bullying, psychological abuse and intimidation, sexual harassment (quid pro quo and hostile environment), threats of violence, economic and financial abuse, stalking, mobbing, human trafficking and forced labor, and forced prostitution.¹⁶⁰ Focusing on the perspective of the target of the abuse rather than the intention of the alleged perpetrator, the likely or actual results of the behaviors are determinative. Importantly, the Convention does not require a certain level of severity or pervasiveness of the violence and harassment including GBVH in order for it to be prohibited.¹⁶¹ The definition also includes recognition of the role of the actions and structures of work in GBVH.

The decision to focus on the range of abuses that is inclusive but not limited to sexual harassment reflects the advocacy by women and other marginalized workers who reported their experiences of sex and GBVH that did not meet the narrower definition of sexual harassment previously adopted by the ILO. Examples of reported sexual harassment shared by women workers during the negotiations of ILO Convention 190 included: being repeatedly threatened with physical abuse or termination by supervisors in the workplace for not meeting quotas, as well as being told that they are worthless, that they should stay home and take care of their families, and that women have no business being in the workplace.¹⁶² In these ways, workers often experience violence and harassment on the basis of gender as well as sex. This is much more reflective of the unequal gender-based power dynamics present in the workplace, which are risk factors for GBVH, including sexual harassment. The definition of GBVH in ILO Convention

¹⁵⁸ See, e.g., S.B. 1141, 2019-2020 Sess. (Cal. 2020) (amending Family Code Sec. 6320(c) [the Domestic Violence Prevention Act] to clarify that conduct used to establish coercive control, defined as “a pattern of behavior that in purpose or effect unreasonably interferes with a person’s free will and personal liberty” constitutes abuse).

¹⁵⁹ ILO Convention No. 190, *supra* note 1, at 5.

¹⁶⁰ See Cruz & Klinger, *supra* note 11.

¹⁶¹ See ILO Convention No. 190, *supra* note 1.

¹⁶² See SOLIDARITY CTR., IN OUR OWN WORDS: WOMEN ADDRESS GENDER-BASED VIOLENCE IN GARMENT FACTORIES IN INDONESIA (May 2019), https://www.solidaritycenter.org/wp-content/uploads/2019/06/Gender_Indonesia-report.6.19.pdf [<https://perma.cc/TT6M-Q33W>].

190 includes violence and harassment against a worker because of gender identity, including transgender status, or because of sexual orientation by prohibiting “violence or harassment, including sexual harassment, directed at workers because of their sex or gender[.]”¹⁶³ In this way, ILO Convention 190 expressly protects LGBTQ+ workers from harassment and violence, which until recently Title VII was not uniformly interpreted to do and still does not explicitly state.¹⁶⁴ Amending federal law to prevent and prohibit GBVH and sexual harassment in the workplace would expand the spectrum of behaviors that are to be prevented and prohibited by employers and governments, and would contribute efforts to shift the culture in workplaces that enable these abuses to continue. ILO Convention 190 also prohibits the institutionalization of power inequalities that are risk factors for GBVH in the world of work by stating that it includes these abuses when “directed at” or “affecting persons of a particular sex or gender.” This language is critical to include in legislation intended to prevent forms of GBVH because it acknowledges that institutionalized policies, procedures or structures may create risks of GBVH in the world of work. Thus, this language requires that employers be held accountable for their policies and efforts to prevent and address these abuses.

ILO Convention 190 also requires governments to take appropriate measures to address the impact of domestic violence in the workplace as a part of their efforts to prevent and address GBVH.¹⁶⁵ Article 10(f) requires states to recognize the effect of domestic violence and, “as far as is reasonably practicable, mitigate its impact in the world of work.”¹⁶⁶ Recommendation 206 states that such mitigation measures could include leave for victims of domestic violence or flexible work arrangements and protection for victims of domestic violence.¹⁶⁷ This inclusion of domestic violence is significant, addressing the responsibility of governments, employers’ and workers’ organizations to prevent and respond to the negative impact domestic violence has on an individual’s ability to obtain and maintain employment and union membership. Also, employers and governments have a responsibility to address that it is an employment issue and not only a private matter.¹⁶⁸ Several states in the U.S. have adopted

¹⁶³ SOLIDARITY CTR., *SEXUAL HARASSMENT AND GENDER-BASED VIOLENCE IN THE GLOBAL GARMENT AND TEXTILE INDUSTRY* (2019), <https://www.solidaritycenter.org/wp-content/uploads/2019/08/Fact-Sheet.GBVH-in-garment-industry.8.19.pdf> [<https://perma.cc/CSU7-XSBH>].

¹⁶⁴ See *infra* Part II.

¹⁶⁵ ILO Convention No. 190, *supra* note 1, at 4, 10, 16, 19–20.

¹⁶⁶ *Id.* at 10.

¹⁶⁷ *Id.* at 19.

¹⁶⁸ See JULIE GOLDSCHIED & ROBIN RUNGE, *EMPLOYMENT LAW AND DOMESTIC VIOLENCE: A PRACTITIONER’S GUIDE* (2010), <https://www.americanbar.org/content/dam/aba/administrative/domestic>

legislation which prohibit discrimination against employees who are victims of domestic violence, require employers to provide unpaid or paid leave to employees who are victims of domestic violence to address the impact of the violence in their lives, or require employers to provide job accommodations for employees who are victims of domestic violence.¹⁶⁹ Moreover, as of 2017, certain federal government contractors must provide employees who are victims of domestic or sexual violence paid leave for specific reasons related to their victimization.¹⁷⁰ Federal legislation has been introduced over the past twenty years to provide leave from work and prohibit discrimination against victims of domestic and sexual violence, but none has seen very much movement.¹⁷¹ However, this patchwork does not provide the comprehensive approach contained in ILO Convention 190, which requires employers and governments to take steps to address the impact of domestic violence on the workplace, including by providing leave from work and limiting termination from employment.

In these ways, ILO Convention 190 and Resolution 206 provide language that, if adopted by policymakers in state and federal legislation, by employers in workplace policies, and by unions in collective bargaining agreements, would significantly improve efforts to prevent and address GBVH in the workplace, including but not limited to sexual harassment. It would remove the exclusive focus on sex by also including gender, thereby preventing the broader range of abuses experienced by workers. In particular, policymakers should incorporate what was learned from disclosures on social media and elsewhere as part of the #MeToo movement: that women and other marginalized workers are experiencing not just sexual harassment as narrowly interpreted in federal law, but also other forms of gender and sex-based violence and harassment including bullying, stalking, and assault that are intended to maintain the position of power of the harasser over the target, thus perpetuating gender inequality in the workplace. Moreover, it would clarify that one incident, without meeting a standard of severity or pervasiveness, would be actionable.¹⁷²

_violence1/Workplace/ABA_CDV_Employ.authcheckdam.pdf [https://perma.cc/U3UU-MQXF]; see also Robin Runge, *The Legal Response to the Employment Needs of Domestic Violence Victims, An Update*, 37 HUM. RTS. 13 (2010).

¹⁶⁹ Maurer, *supra* note 43. California, Illinois, New York, and Arizona are among the states who have adopted these types of legislation.

¹⁷⁰ See Executive Order 13706, Establishing Paid Sick Leave for Federal Contractors, U.S. DEP'T OF LABOR, <https://www.dol.gov/agencies/whd/government-contracts/sick-leave> [https://perma.cc/NUZ5-ERRN] (last visited Mar. 8, 2021).

¹⁷¹ See generally GOLDSCHIED & RUNGE, *supra* note 168.

¹⁷² In 2019, California amended its law to state that a "single incident of harassing conduct is sufficient to create a triable issue regarding the existence of a hostile work environment . . ." Cal. Gov't Code § 12923(b) (West 2019). New York amended its law in 2019 to prohibit an employer from subjecting any

B. Protecting the Most Vulnerable Workers from Gender-Based Violence and Harassment in the World of Work

As described above, there is no group of workers or sector that is immune from GBVH in the workplace. However, there are workers who, because of the sector in which they work, occupational segregation, significant unequal gender-based power imbalances, and/or isolation and the multiple forms of societal, cultural and economic discrimination they experience, are at greater risk of experiencing GBVH at work.¹⁷³ Instead of incorporating these and other risk factors into efforts to prevent and address GBVH in the workplace, U.S. laws and policies prohibiting sexual harassment have excluded some of the sectors and groups of workers who experience the highest rates of GBVH at work.¹⁷⁴ Adopting the language contained in ILO Convention 190 requiring that “workers,” rather than only employees as defined under Title VII, be protected from violence and harassment, including GBVH, would protect those workers experiencing the highest rates of these forms of abuse.¹⁷⁵

One of the significant limitations of the effectiveness of U.S. federal law prohibiting sexual harassment in the workplace is that it only covers “employees”¹⁷⁶ and employers with fifteen or more employees,¹⁷⁷ which excludes many farmworkers, most domestic workers, independent contractors, “gig” workers, and small businesses. This is critical, as the way that work is organized and performed has dramatically changed in the last fifty years as globalization and prioritization of profits has led to a fissuring of the workplace in which employers rely increasingly on a workforce made up of the cheapest labor possible. This means any form of labor other than a full-time direct employee, such as independent contractors, temporary workers, and informal working relationships including “gig” economy workers who drive for Uber or deliver for DoorDash, are not covered.¹⁷⁸ At

individual to harassment because of the individual’s membership in a protected category “regardless of whether such harassment would be considered severe or pervasive under precedent applied to harassment claims.” N.Y. Exec. Law § 296(1)(h) (McKinney 2019).

¹⁷³ See SALLY NEVILLE ET AL., SOC. DEV. DIRECT, ADDRESSING GENDER-BASED VIOLENCE AND HARASSMENT 39–40 (2020), <http://www.ebrd.com/gbvh-good-practice.pdf> [<https://perma.cc/B8BC-NRFD>].

¹⁷⁴ RUNGE, ENDING GENDER-BASED VIOLENCE, *supra* note 28, at 11.

¹⁷⁵ Economic News Release, Contingent and Alternative Employment Arrangements, U.S. BUREAU OF LABOR STATISTICS, <https://www.bls.gov/news.release/conemp.toc.htm> [<https://perma.cc/6JQ8-S2DU>] (last visited Nov. 20, 2020).

¹⁷⁶ 42 U.S.C. § 2000e(f) (2018). “Employee” also excludes state elected officials, their staff, and appointees. *Id.*

¹⁷⁷ 42 U.S.C. § 2000e(b) (2018).

¹⁷⁸ See DAVID WEIL, THE FISSURED WORKPLACE (Harvard Univ. Press 2014) (arguing that there have been a number of efforts to try to address this phenomenon, in particular the misclassification of “gig” or

the same time, workplace protections in the U.S. remain tied to full-time, permanent employment with one employer reflecting a work arrangement that has been recognized to benefit primarily white men.¹⁷⁹ Approximately 16.6 percent of the workforce in the U.S. is primarily employed in informal or non-standard work arrangements to which most federal and state laws providing protections, including from sexual harassment, do not extend.¹⁸⁰ Moreover, another almost ten percent of the workforce is self-employed.¹⁸¹ This means that a large number of workers are made more vulnerable by a lack of accountability for these abuses. To better prevent and address GBVH in the world of work, laws and policies need to provide protections to all workers.

Title VII of the Civil Rights Act, which is the federal law that prohibits sex discrimination against employees, defines employee as “an individual employed by an employer.”¹⁸² This circular definition has led to the development of a number of different tests by courts to determine whether a specific worker is an employee of a given employer.¹⁸³ These tests have focused on whether the employer can hire and fire the worker, what kind of supervision and control (if any) the employer has over the worker’s work, and how and when it is performed.¹⁸⁴ Because the applicability of Title VII prohibiting sexual harassment is limited to employees, applicants to become

“platform” workers); *Dynamex Operations West, Inc. v. Superior Court*, 416 P.3d 1, 7 (2018), rehearing denied (June 20, 2018) (holding that the ABC test should be used to determine worker classification under California state law). The passage of A.B. 5 codified the *Dynamex* holding. A.B. 5, 2019-2020 Sess. (Cal. 2020). But it was overturned by a ballot initiative paid for by Uber and Lyft. Sarah Ashley O’Brien, *Prop 22 Passes in California, Exempting Uber and Lyft from Classifying Drivers as Employees*, CNN (Nov. 4, 2020, 4:02 PM), <https://www.cnn.com/2020/11/04/tech/california-proposition-22/index.html> [<https://perma.cc/B2AB-2846>].

¹⁷⁹ See LIBBY REDER ET AL., *THE ASPEN INS., DESIGNING PORTABLE BENEFITS: A RESOURCE GUIDE FOR POLICYMAKERS* 10–20 (June 2019), https://www.aspeninstitute.org/wp-content/uploads/2019/06/Designing-Portable-Benefits_June-2019_Aspen-Institute-Future-of-Work-Initiative.pdf [<https://perma.cc/834J-6MB4>]; INT’L LABOUR ORG., *GUIDE TO DEVELOPING BALANCED WORKING TIME ARRANGEMENTS* 6 (2019), https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_706159.pdf [<https://perma.cc/MZA3-K5VA>].

¹⁸⁰ INT’L LABOUR OFFICE, *WOMEN AND MEN IN THE INFORMAL ECONOMY: A STATISTICAL PICTURE* 87 (3d ed. 2018), https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms_626831.pdf [<https://perma.cc/8ARP-QTXE>].

¹⁸¹ See JENNY R. YANG ET AL., *URBAN INST., REIMAGINING WORKPLACE PROTECTIONS* 1, 5 (Dec. 2020), https://www.urban.org/sites/default/files/publication/103331/reimagining-workplace-protections_0.pdf [<https://perma.cc/44AD-GZDH>].

¹⁸² 42 U.S.C. § 2000e(f) (defining the term “employee” to exclude State and elected public officials, their staffs, and their appointees); *see, e.g.*, 775 Ill. Comp. Stat. Ann. 5/2-101 (LexisNexis, Lexis Advance through P.A. 101–673 of the 2020 Sess. of the 101st Leg.) (demonstrating that some state laws prohibiting sex discrimination contain definitions of employee that include “anyone performing services for remuneration within the State for an employer, an apprentice, and unpaid interns in certain circumstances”).

¹⁸³ See *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323 (1992) (describing the same definition of employee under ERISA).

¹⁸⁴ See, e.g., *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1067 (N.D. Cal. 2015).

employees, and former employees, whether or not a worker is an employee has been extensively litigated and remains unclear in many circumstances.¹⁸⁵ Title VII's employee threshold of at least fifteen employees "for each working day in each of twenty or more calendar weeks in the current or preceding calendar year"¹⁸⁶ in combination with this lack of clarity of what constitutes an employee has significantly limited the number of workers who are protected from sexual harassment under U.S. law. The employee threshold has excluded many domestic workers and farm workers.¹⁸⁷ Employers have increasingly taken the position that those who work for them do so as independent contractors, and not employees, such as drivers for Uber or Lyft.¹⁸⁸ As part-time, flexible, platform and similar forms of work—which have always existed, but now are expanded pursuant to a variety of economic pressures to limit costs and liability based on the false narrative that it increases opportunity for marginalized workers, including women—grow, a higher and higher percentage of the paid and unpaid workforce is without protections from sexual harassment in the U.S.

The BE HEARD Act that was introduced in the House and Senate in April 2019 also addressed this gap in protections by proposing to amend Title VII so that it applied to all employees regardless of business size and all workers including independent contractors, volunteers, interns, fellows, and trainees.¹⁸⁹ Moreover, the Domestic Workers Bill of Rights Act would extend protections from sexual harassment to domestic workers if it were signed into law.¹⁹⁰ Each of these represent efforts to address these critical gaps in protections from GBVH in the world of work, but neither has a clear route to becoming law in the near future.

Adoption of the definition of "worker" from ILO Convention 190 by federal law, state law, employer policy and union collective bargaining agreements eliminates all of these issues more directly and comprehensively because it includes all workers in protections from all forms of violence and harassment. ILO Convention 190 protects "other persons in the world of work" regardless of employer size, as well as people working irrespective of contractual status, people in training, interns, apprentices, terminated

¹⁸⁵ Americans With Disabilities Act, 42 U.S.C. § 12112(a) (2018); Age Discrimination in Employment Act, 29 U.S.C. § 623(a) (2018) (demonstrating that the same definition of "employee" which excludes many workers is included in other federal anti-discrimination laws).

¹⁸⁶ 42 U.S.C. § 2000e(b).

¹⁸⁷ 42 U.S.C. § 2000e(f).

¹⁸⁸ Proposed Rule: Independent Contractor Status under the FLSA, 29 CFR Parts, 780, 788, and 795, U.S. DEP'T OF LABOR, <https://www.dol.gov/agencies/whd/flsa/2020-independent-contractor-nprm> [<https://perma.cc/M7TH-YWB4>].

¹⁸⁹ Bringing an End to Harassment by Enhancing Accountability and Rejecting Discrimination in the Workplace Act, H.R. 2148, 116th Cong. §§ 202, 301 (2019).

¹⁹⁰ S. 2112, 116th Cong. § 403 (2019-2020).

workers, volunteers, job-seekers, job applicants and individuals exercising the duties and responsibilities of an employer.¹⁹¹ It applies to all sectors, including public, private, formal and informal, urban and rural.¹⁹² This is critical because it extends the right to be free from violence and harassment, including GBVH, beyond full-time workers with formal contracts to independent contractors, informal workers, workers who are part-time, those who have no employment contract, and workers who are disproportionately affected by GBVH. This is significant because the majority of workers in the informal sector with precarious work arrangements are women and marginalized workers who experience the highest rates of GBVH—such as garment workers, domestic workers and market workers, precisely because of the precarity and informality of their work—and thus need these protections the most. To be in compliance with Convention 190, states must ensure that this broader definition of “worker” is included in laws addressing GBVH.

Employers have consistently opposed extension of liability for GBVH beyond full-time employees, as demonstrated by their opposition to legislation proposed to do so, their continued effort to misclassify workers, and the expansive fissuring of the workplace through the use of subcontractors and informal workers.¹⁹³ The primary motivation behind these efforts has been cost; however, there is increasing research that indicates ignoring sexual harassment in an employer’s supply chain or workplace, committed by anyone conducting work for them, has negative economic consequences as well.¹⁹⁴ Ignoring GBVH can be costly to employers in many ways, including through increased health care contributions, decreased productivity, higher rates of turnover, and legal fees.¹⁹⁵ Further, credible allegations of sexual harassment have been shown to have negative impacts on stock prices, devaluing companies by as much as twenty percent.¹⁹⁶

¹⁹¹ ILO Convention No. 190, *supra* note 1, at 5.

¹⁹² *Id.* at 6.

¹⁹³ JANE PILLINGER, INT’L LABOUR OFFICE, VIOLENCE AND HARASSMENT AGAINST WOMEN AND MEN IN THE WORLD OF WORK: TRADE UNION PERSPECTIVES AND ACTION 1, 87–88 (2017), https://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---actrav/documents/publication/wcms_546645.pdf [<https://perma.cc/LU2M-B4CU>] (describing the efforts by different unions and advocacy groups to expand who is covered in gender based violence and harassment but to no avail in legislation).

¹⁹⁴ *Id.* (describing the economic downturn of the last decade as a motivating factor for legislation failing to expand who is covered in gender-based violence and harassment legislation).

¹⁹⁵ U.S. GOV’T ACCOUNTABILITY OFFICE, WORKPLACE SEXUAL HARASSMENT: EXPERTS SUGGEST EXPANDING DATA COLLECTION TO IMPROVE UNDERSTANDING OF PREVALENCE AND COSTS 1, 26–27 (2020), <https://www.gao.gov/assets/gao-20-564.pdf> [<https://perma.cc/H7LP-3Z42>] (reporting on costs associated with workplace sexual harassment).

¹⁹⁶ Mitchell Hartman, *Workplace Sexual Misconduct Hurts Company Value, New Data Shows*, MARKETPLACE (Aug. 21, 2021), <https://www.marketplace.org/2020/08/21/workplace-sexual-misconduct-hurts-company-va-lu-c-new-data-shows/> [<https://perma.cc/4EKP-XFSH>].

C. *Requiring Employer Programs Focused on Preventing Gender-Based Violence and Harassment in the World of Work*

One of the innovative aspects of ILO Convention 190 is its intentional inclusion of an integrated approach to end violence and harassment in the world of work by focusing on prevention, protection, awareness raising, enforcement, compensation and rehabilitation.¹⁹⁷ This comprehensive approach provides a roadmap for how to create the structural and cultural change necessary to effectively prevent and address all violence and harassment, including GBVH. If employers are successful in developing cultures of respect and prevention, this will result in less GBVH, decreasing liability and increasing productivity.

Although the regulations implementing Title VII state that “[p]revention is the best tool for the elimination of sexual harassment[]”¹⁹⁸ and that “employer[s] should take all steps necessary to prevent sexual harassment from occurring[]” by “developing appropriate sanctions[]” and letting employees know about the right to raise the issue of harassment under Title VII,¹⁹⁹ prevention remains a minor part of policies and programs implemented by employers. This is in part because specific programs addressing prevention of GBVH have not been well-defined nor required.

Until recently, no jurisdiction in the U.S. required employers to develop a policy or training program about sexual harassment in the workplace, let alone one that focuses on prevention and the root causes of GBVH.²⁰⁰ As a result, employers that had them did so voluntarily, often motivated by avoiding liability rather than prevention of sexual harassment.²⁰¹ In 1998, the U.S. Supreme Court considered the issue of employer liability in sexual harassment hostile work environment cases.²⁰² The Court held that an employer is strictly liable for a supervisor’s sexual harassment of a subordinate if there is a tangible employment action.²⁰³ If the alleged behavior does not include a tangible employment action, the employer can

¹⁹⁷ *See id.*

¹⁹⁸ 29 C.F.R. § 1604.11 (2021).

¹⁹⁹ *Id.*

²⁰⁰ *See, e.g.*, Property Services Workers Protection Act, Cal. Lab. C. § 1420 (2019) (requiring sexual harassment and prevention training); Cal. Lab. C. § 1429.5 (2019) (requiring janitorial companies to provide a biennial in-person sexual violence and harassment prevention for nonsupervisors and supervisors using a qualified organization as defined by the statute); N.Y. Lab. L. § 201-g(1)(a) (2019); Me. Rev. Stat. Ann. § 12950(a)(3) (2019).

²⁰¹ Charles H. Fleischer, *Employment Law 101: Employer Liability for Sexual Harassment*, SHRM (Aug. 22, 2018) <https://www.shrm.org/resourcesandtools/hr-topics/behavioral-competencies/business-acumen/pages/employer-liability-for-sexual-harassment.aspx> [<https://perma.cc/VAT2-VC9M>].

²⁰² *See Burlington Industries v. Ellerth*, 524 U.S. 742, 765 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998).

²⁰³ *Burlington Industries*, 524 U.S. at 760.

avoid liability by proving that (1) it exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (2) the plaintiff failed to take advantage of any preventive or corrective opportunities offered by the employer.²⁰⁴ The Court stated that an employer can avoid liability if it creates an antiharassment policy and effective investigating and reporting procedures and educates its employees on how to use them, and if the victim fails to report the harassment consistent with those procedures.²⁰⁵ The holdings in these cases provided a clear path for employers to limit their costs by limiting their liability. Unfortunately, a workplace policy focusing on limiting liability may not also be focused on preventing and addressing sexual harassment. The efficacy of many employer policies has historically been measured by the number of complaints received from employees, leading to efforts to minimize complaints, increase secrecy around informal complaints, and implement procedures such as mandatory arbitration agreements to minimize exposure in court.²⁰⁶

In recent years, many workplace programs have been reconsidered in light of #MeToo and research indicating that the number of complaints of sexual harassment received by an employer or by the EEOC does not reflect the amount of sexual harassment being experienced in a specific workplace, since the majority of survivors of harassment do not complain.²⁰⁷ Historically, employers have emphasized the efficacy of a complaint process in determining if their workplace is free from sexual harassment.²⁰⁸ This focus assumes that sexual harassment will happen and it is the responsibility of the victim to ensure that it stops by filing a complaint. As surveys of workers who have experienced sexual harassment have shown the many reasons why they choose not to file complaints—fear of retaliation or that nothing will change, among others—increased recognition of the need to shift focus to changing the culture in workplaces has led employers to begin to take affirmative responsibility for doing so by creating confidential mechanisms through which employees can report behavior without necessarily triggering a formal complaint process.²⁰⁹

²⁰⁴ *Id.* at 765.

²⁰⁵ *Id.*

²⁰⁶ Mark V. Roehling & Jason Huang, *Sexual Harassment Training Effectiveness: An Interdisciplinary Review and Call for Research*, 39 J. ORG. BEHAV. 134 (2018), <https://www.glaxdiversitycouncil.com/wp-content/uploads/2020/11/Sexual-Harassment-Training-Effectiveness-Research.pdf> [<https://perma.cc/N6C6-5P3R>].

²⁰⁷ See FELDBLUM & LIPNIC, *supra* note 58, at 59.

²⁰⁸ See generally *tEQuitable is a Modern Tech-Enabled Ombuds Practice*, TEQUITABLE, <https://www.tequitable.com/ombuds> [<https://perma.cc/QCU6-R38P>] [hereinafter *tEQuitable*] (last visited Mar. 29, 2021).

²⁰⁹ *Id.*

Involving workers who experience sexual harassment in the development of workplace programs to prevent and address sexual harassment has proven to be most effective.²¹⁰ In Los Angeles, immigrant women janitorial workers successfully advocated for prioritization of sexual harassment by their union, the Service Employees International Union - United Service Workers West, by sharing their experiences with sexual violence on the job.²¹¹ This led to the inclusion of a provision to address sexual harassment in their collective bargaining agreements with employers starting in 2016, as well as the adoption of a state law that would require janitorial employers to provide trainings on the prevention of sexual violence and harassment by 2019.²¹² They have since created the Ya Basta Coalition, and women unionists themselves conduct ongoing trainings for their peers on how to prevent sexual violence and sexual harassment in the workplace.²¹³ Similarly, in Florida, the Coalition for Immokalee Workers, a worker coalition of tomato pickers, created the Fair Food Program that requires growers in the program to participate in an anti-sexual harassment program, otherwise the growers who have signed on to the program will not purchase the tomatoes they are harvesting.²¹⁴ Each of these worker-led programs have changed workplace culture and prevented incidents of GBVH.²¹⁵

Prevention of GBVH in the world of work requires direct involvement by those workers who experience it most in the development of anti-harassment programs, with a focus on cultural change, a gender-responsive approach, and taking risk factors into consideration.²¹⁶ ILO Convention 190 also requires that workers have sufficient power to engage in the process of preventing and addressing GBVH in the workplace without fear of termination or other forms of retaliation.²¹⁷ For this reason, ILO Convention 190 requires governments that ratify it to “respect, promote and realize the

²¹⁰ See generally Bernice Yeung, *How a Group of Janitors Started a Movement to Stop Sexual Abuse*, KQED (Jan. 16, 2018), <https://www.kqed.org/news/11642102/how-a-group-of-janitors-started-a-movement-to-stop-sexual-abuse> [<https://perma.cc/FXB6-2KL9>]; Bernice Yeung, *A Group of Janitors Started a Movement to Stop Sexual Abuse*, FRONTLINE (Jan. 16, 2018), <https://www.pbs.org/wgbh/frontline/article/a-group-of-janitors-started-a-movement-to-stop-sexual-abuse/> [<https://perma.cc/DL23-BUKQ>]; Ya Basta! Coalition Ending Sexual Violence Against Janitors, WORKSAFE (Dec. 21, 2016), <https://worksafe.org/campaigns/workplace-violence.html/article/2016/12/21/ya-basta-coalition-ending-sexual-violence-against-janitors> [<https://perma.cc/CPS6-EHBN>].

²¹¹ See *tEQuitable*, *supra* note 211.

²¹² *Id.*

²¹³ *Id.*

²¹⁴ FAIR FOOD STANDARDS COUNCIL, FAIR FOOD 2018 UPDATE 2–3, 21 (2019), <https://www.fairfoodprogram.org/wp-content/uploads/2019/10/Fair-Food-Program-2018-SOTP-Update-Final.pdf> [<https://perma.cc/78Q6-8BF8>].

²¹⁵ See generally *id.*

²¹⁶ ILO Convention No. 190, *supra* note 1, at 17, 21.

²¹⁷ *Id.* at 9, 17.

fundamental principles and rights at work, namely freedom of association and the effective recognition of the right to collective bargaining.”²¹⁸ Implementation of ILO Convention 190 and Recommendation 206 into federal law, workplace policies, and collective bargaining agreements will more effectively achieve these goals. ILO Convention 190 states that governments that ratify it “shall respect, promote and realize the right of everyone to a world of work free from violence and harassment.”²¹⁹ This human rights approach to violence and harassment shifts the focus from addressing GBVH when it happens to preventing it entirely. Governments that ratify ILO Convention 190 must adopt an inclusive, integrated, and gender-responsive approach to the prevention and elimination of violence and harassment in the world of work, including GBVH, in consultation with representative employers and workers’ organizations.²²⁰

ILO Convention 190 requires governments to take on the structural and institutional risk factors for GBVH in the world of work as a part of prevention efforts, including identifying work arrangements, such as occupational segregation and unequal power structures based on gender, race, immigration status, and other criteria.²²¹ Governments, through the adoption of national laws and policies, must take appropriate measures to prevent violence and harassment in the world of work by identifying the sectors or occupations and work arrangements in which workers and other persons concerned are more exposed to violence and harassment and take measures to effectively protect such persons.²²² ILO Convention 190 also requires governments to adopt laws, regulations, and policies ensuring the right to equality and non-discrimination in employment and occupation, including for women workers, as well as for workers and other persons belonging to one or more vulnerable groups that are disproportionately affected by violence and harassment, including GBVH, in the world of work.²²³

A number of risk factors for sexual harassment have been identified by the EEOC Select Task Force; however, there is no federal legal requirement

²¹⁸ *Id.* at 7.

²¹⁹ *Id.* at 6.

²²⁰ *See generally id.* Convention 190 explains an approach that includes providing for critical governments, employers, and unions to adopt a comprehensive strategy in order to implement measures to prevent and combat violence and harassment. *Id.* Further, it would establish or strengthen enforcement and monitoring mechanisms; ensure access to remedies and support for victims; provide for sanctions; develop tools, guidance, education and training; raise awareness; and ensure effective means of inspection and investigation of cases of violence and harassment, including GBVH, through labor inspectorates or other competent bodies. *Id.*

²²¹ *Id.* at 8, 17.

²²² *Id.* at 8–9.

²²³ *Id.* at 7.

for employers to assess risks and take measures to prevent and address them.²²⁴ These risks include sex segregated workforces; jobs where employees are isolated from other workers, such as housekeepers at hotels or domestic workers; workers with precarious work arrangements, such as non-traditional work where there is no formal or written contract for employment; where employment and/or pay is dependent on customer service, such as service industry employees who rely on tips for the majority of their wages; and structures where one person has significant unregulated authority over a large number of other workers, such as a farmhand supervisor, or a supervisor on a manufacturing line.²²⁵ ILO Convention 190 requires the adoption of laws and regulations that would require employers “to take appropriate steps commensurate with their degree of control” to prevent violence and harassment in the world of work, such as adopting a workplace policy on violence and harassment, identifying hazards and assessing the risks of violence and harassment with the participation of workers and their representatives, and taking measures to prevent and control them.²²⁶ Moreover, employers are required to provide information and training to workers on the identified hazards and risks of violence and harassment, including GBVH.²²⁷ By adopting the language in federal law and policy regarding identifying and addressing risk factors, prevention of GBVH in the world of work will be more effectively prevented by taking on the structural and institutional causes in addition to the individual manifestations. Only through structural change can prevention of GBVH be sustainable. GBVH in the world of work is a societal, structural and systemic problem which has individual impacts, so effective efforts to prevent and address it must have both systemic and structural responses as well as individual ones.

D. Enforcement Mechanisms and Remedies

The stated focus for enforcement of laws and policies addressing sexual harassment has been on “mak[ing] whole relief for the victim” by holding the individual harasser accountable.²²⁸ This has included remedies such as compensation for lost wages and reinstatement for the survivor, training on sexual harassment for the accused, suspension with or without pay, demotion, and separation or termination from employment for the harasser. Under Title VII, remedies available to a prevailing party against an employer in a sexual

²²⁴ See FELDBLUM & LIPNIC, *supra* note 58.

²²⁵ *See id.*

²²⁶ ILO Convention No. 190, *supra* note 1, at 8.

²²⁷ *Id.* at 9.

²²⁸ *E.E.O.C. v. Kelley Drye & Warren, LLP*, 2011 WL 3163344, at *2 (S.D.N.Y. July 25, 2011).

harassment case may include injunctive relief, reinstatement, back pay, front pay, compensatory damages, punitive damages,²²⁹ equitable relief, and attorney's fees.²³⁰ Remedies and penalties available by law are largely limited to the victim and the harasser. However, sexual harassment is an institutional and societal problem, and firing the harasser alone does nothing to address the culture that allowed the harassment to occur and continue in the first place. It may serve as a temporary deterrent, preventing others from committing similar forms of abuse by others in the same workplace, but that assumes people know why the harasser was fired or left their employment. Because of the focus on secrecy, it is rarely known when a harasser is fired or otherwise held accountable for sexual harassment by an employer. As a result, as others have observed, "sooner or later, other harassers will take their place—unless the underlying conditions that foster harassment in the first place are addressed."²³¹ Nor does termination from employment of the harasser address the immediate and long-term impacts of the sexual harassment on the victim, her family, and career.

The addition of innovative injunctive remedies targeting the way work is structured would ensure that once the harasser is fired, the next person hired in the same position does not simply pick up where the last one left off, continuing to assert their power by subjugating women with GBVH. In addition, true compensatory relief for survivors would include paid leave from work, safety accommodations during the investigation and afterward, recognizing the risk involved in reporting, and ongoing financial support for the long term detrimental impact of the violence and/or harassment on her career, family and community.

To address the structural nature of violence and harassment, including GBVH, ILO Recommendation 206—which supplements and provides guidance for implementation of ILO Convention 190—addresses both the individual and institutional causes of GBVH in the world of work. It states that remedies should include the right of the victim to resign with compensation, reinstatement, compensatory damages, and an order requiring immediate injunctive relief to ensure that certain conduct is stopped or that policies or practices are changed, in addition to legal fees and costs.²³² Support services and remedies for victims of GBVH should include measures

²²⁹ *Kolstad v. American Dental Ass'n*, 527 U.S. 526, 530 (1999) (explaining that punitive damages are only recoverable if it is proven that the employer acted "with malice or with reckless indifference to the federally protected rights of an aggrieved individual").

²³⁰ See generally *id.* (noting that Title VII prohibits retaliation against the individual alleging sexual harassment, or those who oppose discrimination or participate in a Title VII process).

²³¹ Schultz, *Sexual Harassment, Again*, *supra* note 68, at 23.

²³² ILO Convention No. 190, *supra* note 1, at 18.

aimed at supporting victims re-entering the labor market; counseling and information services; twenty-four-hour hotlines; emergency services; medical care and treatment and psychological support; crisis centers, including shelters; and specialized police units or specially trained officers to support victims.²³³ In addition, employers must ensure that workers have the right to remove themselves from a work situation which they have reasonable justification to believe presents an imminent and serious danger to life, health, or safety due to violence and harassment, without facing retaliation or other undue consequences.²³⁴ Further, ILO Recommendation 206 states that perpetrators of violence and harassment in the world of work should be held accountable and provided counseling or other measures with a view to preventing the reoccurrence of violence and harassment, facilitating their reintegration into work, where appropriate.²³⁵ Inclusion of these comprehensive remedies in federal law, workplace policies and collective bargaining agreements would dramatically improve efforts to prevent and address GBVH in the world of work, including sexual harassment.

IV. CONCLUSION

Governments, employers, unions, policymakers, as well as women's, feminist, and human rights advocates around the world share a commitment to creating safe workplaces through the prevention of violence and harassment, including GBVH. These efforts must be led and implemented by those disproportionately impacted in order to be effective. They know best the impacts of these abuses on their lives, and what they need in order to be safe. ILO Convention 190 is the product of an inclusive process led by women workers, negotiated with representatives of employers and governments. The language contained in the Convention can be used to effectively complement and strengthen ongoing policy and legal advocacy in the U.S. to prevent and address GBVH in the world of work.²³⁶

Although Ratification of ILO Convention 190 by the United States would be preferable, it is not absolutely necessary for Congress to adopt federal legislation containing its provisions, or for employers and unions to integrate its language into their policies to ensure that the full range of gender and sex-based harassment is prevented and addressed for all workers, regardless of employment status. GBVH cannot be prevented and addressed if all violence and harassment is not addressed in the workplace. Therefore, a

²³³ *Id.* at 19.

²³⁴ *Id.* at 18.

²³⁵ *Id.*

²³⁶ *See supra* Part III.

comprehensive approach like that contained in ILO Convention 190 should be utilized on the state, federal, and individual workplace level. Incorporating an intersectional approach that includes individual and institutional accountability to laws and workplace policies is essential to ensure successful cultural change in workplaces that promotes respect while acknowledging the need to address the root causes of GBVH in the world of work.